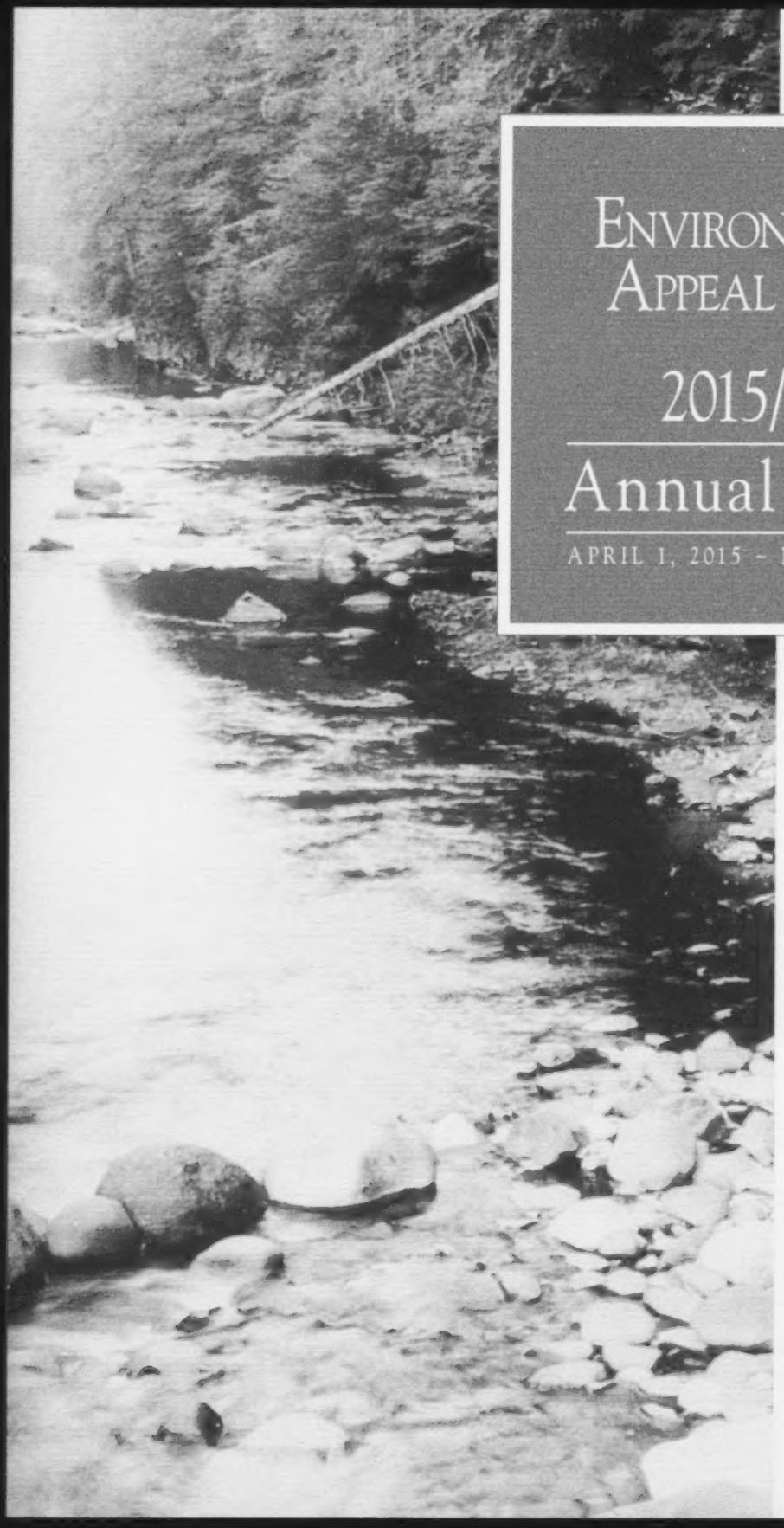

Environmental Appeal Board

2015/2016

Annual Report

APRIL 1, 2015 ~ MARCH 31, 2016

BRITISH COLUMBIA

Environmental Appeal Board

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The Honourable Steve Thomson
Minister of Forests, Lands and Natural Resource Operations
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Dear Ministers:

I respectfully submit herewith the Annual Report of the Environmental Appeal Board for the period April 1, 2015 through March 31, 2016.

Yours truly,

Alan Andison
Chair
Environmental Appeal Board

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15/16

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Message from the Chair

I am pleased to submit the Annual Report of the Environmental Appeal Board for the 2015/2016 fiscal year.

The Year in Review – Appeals

During the past year, the Board experienced a significant increase in the number of appeals filed compared to the previous year. One hundred and forty three appeals were filed during the 2015/2016 fiscal year, compared to 55 during 2014/2015. Notably, in 2015/2016, companies in the pulp and paper industry filed 102 appeals under the *Environmental Management Act*. Despite the increase in appeals filed, the Board continues to work towards reducing the number of appeals that proceed to a hearing, and to reduce the costs associated with hearings. The Board closed a total of 57 appeals during 2015/2016, and 29 of those appeals that were resolved did not require a hearing, as the appeals were withdrawn, abandoned, rejected, or resolved by consent of the parties. I am also pleased to note that most of these hearings were conducted by way of written submissions, which reduces costs for all parties and the Board.

In addition, the Board dealt with two particularly complex matters that engaged a high degree of interest from the public. One of those matters involved several appeals against a permit amendment authorizing an increase in the amount of sulphur dioxide emitted from an aluminum smelter in Kitimat. After a four-week oral hearing in which the parties presented voluminous expert evidence, the Board decided to confirm the permit amendment, but the Board also made several recommendations in response to local concerns about air quality. The other matter involved an appeal by a First Nation against a water licence issued to an oil and gas company. The five-year licence authorized the diversion of up to 2.5 million cubic metres of water per year from a lake in northeastern BC for use in the fracking process. The First Nation's members conduct traditional activities in the vicinity of the lake pursuant to their rights under Treaty 8. After a five-week oral hearing involving complex expert evidence, the Board decided to cancel the water licence due to serious technical flaws and serious defects in the Crown's consultation process with the First Nation.

Legislative Changes

Three significant aspects of the Board's enabling legislation were affected by legislative changes during this report period.

First, on December 17, 2015, a number of changes were made to the legislation that sets out the Board's powers and procedures. Many of the powers and procedures that were previously found in the Board's enabling legislation are now found in the *Administrative Tribunals Act*. Although the changes to the legislation were extensive, the Board's powers and

procedures in respect of appeals generally remain the same. One significant difference is that under section 57 of the *Administrative Tribunals Act*, a judicial review of a Board decision must be commenced within 60 days of the date the decision is issued. Previously, there was no time limit for initiating a judicial review of a Board decision.

Next, on January 1, 2016, most sections of the *Greenhouse Gas Industrial Reporting and Control Act* were brought into force, and the *Greenhouse Gas Reduction (Cap and Trade) Act* was repealed. As a result, the Board hears appeals under the *Greenhouse Gas Industrial Reporting and Control Act*, and no longer hears appeals under the *Greenhouse Gas Reduction (Cap and Trade) Act*.

Finally, on February 29, 2016, most sections of the *Water Sustainability Act* were brought into force. The *Water Sustainability Act* replaces the *Water Act*, most of which has been repealed. Limited portions of the *Water Act* related to water users' communities were retained under a re-named Act called the *Water Users' Communities Act*. The Board hears appeal under both of these new Acts, and no longer hears appeals under the *Water Act*.

Board Membership

The Board membership experienced some changes during the past year. I am very pleased to welcome Michael Tourigny as a new member of the Board. He will complement the expertise and experience of the outstanding professionals on the Board. Also, the appointments of O'Brian Blackall, Tony Fogarassy, Blair Lockhart, and Ken Long ended during this reporting period, and I wish to thank each of these distinguished individuals for their service as members of the Board.

I am very fortunate to have a Board that is comprised of highly qualified individuals who can deal with the various subjects that are heard by the Board. The current membership includes professional biologists, agrologists, engineers, foresters, and lawyers with expertise in the areas of natural resources and administrative law. These members bring with them the necessary expertise to hear appeals on a wide range of subject matters, ranging from air emissions and pollution, to hunting at night and ownership of traplines, to water licensing on sensitive streams and water bodies.

I would like to take this opportunity to thank all Board members and staff, for their hard work and dedication over the past year and for their continued commitment to the work of the Board.

Alan Andison
Chair

Introduction

The Environmental Appeal Board hears appeals from administrative decisions related to environmental issues. The information contained in this report covers the period from April 1, 2015 to March 31, 2016.

The report provides an overview of the structure and function of the Board and how the appeal process operates. It contains statistics on appeals filed, hearings held and decisions issued by the Board within the report period. It also contains the Board's recommendations for legislative changes to the statutes and regulations under which the Board has jurisdiction to hear appeals. Finally, a selection of summaries of the decisions issued by the Board during the report period is provided, and sections of the relevant statutes and regulations are reproduced.

Decisions of the Environmental Appeal Board are available for viewing at the Board office, on the Board's website, and at the following libraries:

- Ministry of Environment Library
- University of British Columbia Law Library
- University of Victoria Law Library
- West Coast Environmental Law Library

Decisions are also available through the Quicklaw Database.

Detailed information on the Board's policies and procedures can be found in the Environmental Appeal Board Procedure Manual, which may be obtained from the Board office or viewed on the Board's website. If you have any questions or would like additional copies of this report, please contact the Board office. The Board can be reached at:

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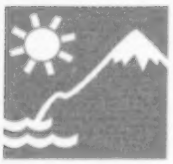


The Board

The Environmental Appeal Board is an independent, quasi-judicial tribunal established on January 1, 1982 under the *Environment Management Act*, and continued under section 93 of the *Environmental Management Act*. As an adjudicative body, the Board operates at arms-length from government to maintain the necessary degree of independence and impartiality. This is important because it hears appeals from administrative decisions made by government officials under a number of statutes.

For the most part, decisions that can be appealed to the Board are made by provincial and municipal government officials under the following seven statutes, the relevant provisions of which are administered by the Minister identified: the *Environmental Management Act*, the *Integrated Pest Management Act*, and the *Greenhouse Gas Industrial Reporting and Control Act*, administered by the Minister of Environment; the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* administered by the Minister of Energy and Mines; and the *Wildlife Act*, the *Water Sustainability Act*, and the *Water Users' Communities Act* administered by the Minister of Forests, Lands and Natural Resource Operations. The legislation establishing the Board is administered by the Minister of Justice and Attorney General of BC.

The Board makes decisions regarding the legal rights and responsibilities of parties that appear before it and decides whether the decision under appeal was made in accordance with the law. Like a court, the Board must decide its appeals by weighing the evidence before it, making findings of fact, interpreting the legislation and the common law and applying the law and legislation to the facts.

In carrying out its functions, the Board has the powers granted to it under the above-mentioned statutes, as well as additional powers provided under the *Administrative Tribunals Act*, including the ability to compel persons or evidence to be brought before the Board. The Board also ensures that its processes comply with the common law principles of natural justice.

Appointments to the Board and the administration of the Board are governed by the *Administrative Tribunals Act*.

Board Membership

Board members are appointed by the Lieutenant Governor in Council (Cabinet) under section 93(3) of the *Environmental Management Act*. The members appointed to the Board are highly qualified individuals, including professional biologists, professional foresters, professional engineers and lawyers with expertise in the areas of natural resources and administrative law. These members apply their respective technical expertise and adjudication skills to hear and decide appeals in a fair, impartial and efficient manner.

The members are drawn from across the Province. Board membership consists of a full-time chair, one or more part-time vice-chairs, and a number of part-time members. The length of the initial appointments and any reappointments of Board members, including the chair, are set out in the *Administrative Tribunals Act*, as are other matters relating to the appointments. That Act also sets out the responsibilities of the chair.

The Board members during this report period were as follows:

The Board	Profession	From
Chair		
Alan Andison	Lawyer	Victoria
Vice-chair		
Robert Wickett, Q.C.	Lawyer	Vancouver
Members		
Maureen Baird, Q.C.	Lawyer	West Vancouver
R. O'Brian Blackall	Land Surveyor	Charlie Lake
Monica Danon-Schaffer	Professional Engineer	Britannia Beach
Cindy Derkaz	Lawyer (Retired)	Salmon Arm
Brenda L. Edwards	Lawyer	Victoria
Tony Fogarassy	Geoscientist/Lawyer	Vancouver
Les Gyug	Professional Biologist	West Kelowna
James Hackett	Professional Forester	Nanaimo
Jeffrey Hand	Lawyer	Vancouver
R.G. (Bob) Holtby	Professional Agrologist	West Kelowna
Gabriella Lang	Lawyer (Retired)	Campbell River
Blair Lockhart	Lawyer/Geoscientist	Vancouver
Ken Long	Professional Agrologist	Prince George
James S. Mattison	Professional Engineer	Victoria
Linda Michaluk	Professional Biologist	North Saanich
Howard Saunders	Forestry Consultant	Vancouver
David H. Searle, CM, Q.C.	Lawyer (Retired)	North Saanich
Daphne Stancil	Lawyer/Biologist	Victoria
Michael Tourigny (from 2015-12-31)	Lawyer (Retired)	Vancouver
Gregory J. Tucker, Q.C.	Lawyer	Vancouver
Douglas VanDine	Professional Engineer	Victoria
Reid White	Professional Engineer/Professional Biologist (Retired)	Dawson Creek
Norman Yates	Lawyer/Professional Forester	Penticton

Administrative Law

Administrative law is the law that governs public officials and tribunals that make decisions affecting the rights and interests of people. It applies to the decisions and actions of statutory decision-makers who exercise power derived from legislation. This law has developed to ensure that officials make their decisions in accordance with the principles of procedural fairness/natural justice by following proper procedures and acting within their jurisdiction.

The Board is governed by the principles of administrative law and, as such, must treat all parties involved in a hearing before the Board fairly, giving each party a chance to explain its position.

Appeals to the Board are decided on a case-by-case basis. Unlike a court, the Board is not bound by its previous decisions; present cases of the Board do not necessarily have to be decided in the same way that previous ones were.

The Board Office

The office provides registry services, legal advice, research support, systems support, financial and administrative services, training and communications support for the Board.

The Board shares its staff and its office space with the Forest Appeals Commission, the Oil and Gas Appeal Tribunal, the Community Care and Assisted Living Appeal Board, the Financial Services Tribunal, the Hospital Appeal Board, the Industry Training Appeal Board and the Health Professions Review Board.

Each of these tribunals operates completely independently of one another. Supporting eight tribunals through one administrative office gives each tribunal greater access to resources while, at the same time, reducing administration and operation costs. In this way, expertise can be shared and work can be done more efficiently.

Policy on Freedom of Information and Protection of Privacy

The appeal process is public in nature. Hearings are open to the public, and information provided to the Board by one party must also be provided to all other parties to the appeal.

The Board is subject to the *Freedom of Information and Protection of Privacy Act* and the regulations under that Act. If a member of the public requests information regarding an appeal, that information may be disclosed, unless the information falls under one of the exceptions in the *Freedom of Information and Protection of Privacy Act*.

Parties to appeals should be aware that information supplied to the Board is subject to public scrutiny and review.

In addition, the names of the parties in an appeal appear in the Board's published decisions which are posted on the Board's website, and may appear in this Annual Report.

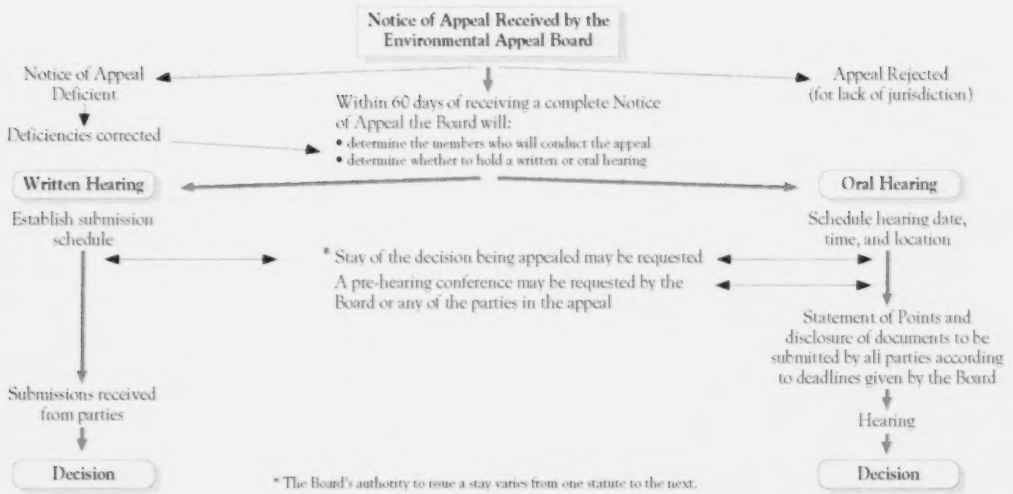
The Appeal Process

General Powers and Procedures of the Board

Part 8, Division 1, of the *Environmental Management Act*, together with the sections of the *Administrative Tribunals Act* specified in section 93.1 of the *Environmental Management Act*, set out the basic structure, powers and procedures of the Board. This legislation describes the composition of the Board and how hearing panels may be organized. It also describes the authority of the Board to add parties to an appeal, the rights of the parties to present evidence, and the Board's power to award costs. Additional procedural details are provided in the *Environmental Appeal Board Procedure Regulation*, B.C. Reg. 240/2015. The relevant portions of the *Environmental Management Act*, the *Administrative Tribunals Act*, and the *Regulation* are included at the back of this report.

In addition to the powers and procedures contained in the *Environmental Management Act*, the *Administrative Tribunals Act*, and the *Regulation*, the Board has developed its own policies and procedures. These policies and procedures have been created in response to issues that arise during the appeal process, from receipt of a notice of appeal, to the hearing, to the issuance of a final decision on the merits. To ensure that the appeal process is open and understandable to the public, these policies and procedures have been set out in the Environmental Appeal Board Procedure Manual which is posted on the Board's website. Also on the Board's website are a number of "Information Sheets" on specific topics and specific stages of the appeal process. The Board has also created a Notice of Appeal form that can be filled out on line. Under section 11 of the *Administrative Tribunals Act*, the Board also has the authority to make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it. During this reporting period, the Board was in the process of developing such rules.

Finally, in order to determine what decisions are appealable to the Board, who can appeal the decisions, the time for filing an appeal, whether the Board can issue a stay of the decision under appeal, and what the Board's decision-making powers are with respect to the appeal, one must consult the individual statutes and regulations which provide the right of appeal to the Board. A summary of the appeal provisions in the individual statutes is provided below.


Notice of Appeal Received by the Environmental Appeal Board
Notice of Appeal Deficient
Deficiencies corrected
Appeal Rejected (for lack of jurisdiction)
Within 60 days of receiving a complete Notice of Appeal the Board will:
• determine the members who will conduct the appeal
• determine whether to hold a written or oral hearing
Written Hearing
Oral Hearing
Establish submission schedule
Schedule hearing date, time, and location
* Stay of the decision being appealed may be requested
A pre-hearing conference may be requested by the Board or any of the parties in the appeal
Statement of Points and disclosure of documents to be submitted by all parties according to deadlines given by the Board
Submissions received from parties
Hearing
Decision
Decision
* The Board's authority to issue a stay varies from one statute to the next.

The Basics: who can appeal, what can be appealed and when to appeal

As stated above, to determine what decisions are appealable to the Board, who can appeal the decisions and the time for filing an appeal, as well as the Board's power to issue a stay, the individual statutes and regulations which provide the right of appeal to the Board must be consulted. The following is a summary of the individual statutes and the provisions that answer these questions.

Environmental Management Act

The *Environmental Management Act* regulates the discharge of waste into the environment, including the regulation of landfills and the clean-up of contaminated sites in BC, by setting standards and requirements, and empowering provincial officials, and in some cases municipal officials, to issue permits, approvals, operational certificates, and orders, and to impose administrative penalties for non-compliance. Waste regulated by this Act includes air contaminants, litter, effluent, refuse, biomedical waste, and special wastes.

The decisions that may be appealed under the *Environmental Management Act* are set out in Part 8, Division 2. That division states that a person "aggrieved by a decision" of a director or a district director may appeal that decision to the Board. An appealable "decision" is defined as follows:

(a) making an order,

(b) imposing a requirement,

(c) exercising a power except a power of delegation,

(d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,

(e) including a requirement or a condition in an order, permit, approval or operational certificate,

(f) determining to impose an administrative penalty, and

(g) determining that the terms and conditions of an agreement under section 115(4) have not been performed [*under section 115(5), a director may enter into an agreement with a person who is liable for an administrative penalty; the agreement may provide for the reduction or cancellation of the penalty, subject to the terms and conditions the director considers necessary or desirable*].

The Board has interpreted the phrase "person aggrieved" to mean that an appellant must establish that he or she has a genuine grievance because a decision has been made which prejudicially effects his or her interests.

The time limit for filing an appeal of a decision is 30 days after notice of the decision is given. The Board may order a stay of the decision under appeal.

Greenhouse Gas Industrial Reporting and Control Act

The *Greenhouse Gas Industrial Reporting and Control Act* enables performance standards to be set for industrial facilities or sectors by listing them within a Schedule to the *Act*. The Schedule sets a greenhouse gas emissions benchmark for liquefied natural gas facilities. The Schedule also includes an emission benchmark (which is not yet in force) for coal based electricity generation operations. The *Act* brings several aspects of previous greenhouse gas legislation into a single *Act*, including the emission reporting framework that was established under the former *Greenhouse Gas Reduction (Cap and Trade) Act*, under which the Board previously heard appeals.

Under this *Act*, certain decisions of a director may be appealed by a person who is served with an appealable decision. Under section 40 of the *Act*, a person who is served with an administrative penalty notice referred to in subsection 40(1)(a) or (b), or a document evidencing a decision referred to in subsection 40(1)(c), may appeal the decision to the appeal board. Under section 40 of the *Act*, the following decisions may be appealed to the Board:

- a determination under section 24 of the *Act*, of non-compliance with reporting requirements or of the extent of that non-compliance, as set out in an administrative penalty notice;
- a determination under section 25 of the *Act*, of non-compliance with the *Act* or regulations, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;
- a prescribed decision or a decision in a prescribed class.

Several types of prescribed decisions can be appealed to the Board pursuant to the section 12 of the *Penalties and Appeals Regulation*. Under section 12(1) of the *Penalties and Appeals Regulation*, a decision under the following sections of the *Greenhouse Gas Emission Reporting Regulation* may be appealed to the Board:

- section 16(2)(a) or (3)(a) [*choice between direct measurement and mass balanced-based methodology*]; and
- section 26(3)(b) [*verification bodies*].

In addition, under section 12(2) of the *Penalties and Appeals Regulation*, a decision under the following sections of the *Greenhouse Gas Emission Control Regulation* may be appealed to the Board:

- section 10(1), (3) or (4) [*suspension or cancellation of accounts*];
- section 13(4)(b) [*validation bodies and verification bodies*];
- section 17(2) [*acceptance of project plan*]; and
- section 23(2) [*issuance of offset units*].

The Board's powers and procedures in Division 1 of Part 8, and sections 101, 102(2) and 103 of the *Environmental Management Act* apply to appeals under the *Act*, as provided in section 40(3) of the *Act* and section 12(4) of the *Penalties and Appeals Regulation*. The time limit for filing an appeal of a decision is 30 days after notice of the decision is given. The Board may order a stay of the decision under appeal.

Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act

The Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act requires suppliers of fuels used for transportation to supply a prescribed percentage of renewable fuels and to submit annual compliance reports to the government, and empowers government officials to impose administrative penalties for non-compliance.

Certain decisions of a director, as designated by the responsible minister, may be appealed by a person who is served with an appealable decision. The decisions that may be appealed are:

- a determination of non-compliance under section 11 of the *Act* [*imposed administrative penalties: fuel requirements*] or of the extent of that non-compliance, as set out in an administrative penalty notice;
- a determination of non-compliance under section 12 of the *Act* [*administrative penalties in relation to other matters*], of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;
- a refusal to accept an alternative calculation of carbon intensity under section 6(5)(d)(ii)(B) of the *Act* [*low carbon fuel requirement*]; and
- a prescribed decision or a decision in a prescribed class.

According to the *Renewable and Low Carbon Fuel Requirements Regulation*, B.C. Reg. 394/2008, the time limit for commencing an appeal is 30 days after the decision is served. The Board is not empowered to order a stay of the decision under appeal.

Integrated Pest Management Act

The Integrated *Pest Management Act* regulates the sale, transportation, storage, preparation, mixing, application and disposal of pesticides in BC. This Act requires permits to be obtained for certain pesticide uses, and requires certain pesticide applicators to be certified. It also prohibits the use of pesticides in a way that would cause an unreasonable adverse effect, and it empowers government officials to impose administrative penalties for non-compliance.

Under this Act, the right of appeal (those with standing to appeal) is quite broad. The *Act* states that "a person" may appeal a decision under this *Act* to the Board. "Decision" is then defined as:

(a) making an order, other than an order under section 8 [*an order issued by the Minister of Environment*];

(b) specifying terms and conditions, except terms and conditions prescribed by the administrator, in a licence, certificate or permit;

(c) amending or refusing to issue, amend or renew a licence, certificate or permit;

(d) revoking or suspending a licence, certificate, permit or confirmation;

(e) restricting the eligibility of a holder of a licence, certificate, permit or pest management plan to apply for another licence, certificate or permit or to receive confirmation;

(f) determining to impose an administrative penalty; and

(g) determining that the terms and conditions of an agreement under section 23(4) have not been performed [*under section 23(4), the administrator may enter into an agreement with a person who is liable for an administrative penalty. The agreement*

may provide for the reduction or cancellation of the penalty, subject to the terms and conditions the administrator considers necessary or desirable].

The time limit for filing an appeal of a decision is 30 days after the date the decision being appealed is made. The Board may order a stay of the decision under appeal.

Water Sustainability Act

The *Water Sustainability Act* regulates the use and allocation of surface water and ground water, regulates works in and about streams, and regulates the construction and operation of ground water wells. It also includes requirements for protecting fish and aquatic ecosystems, dam safety, and compliance. It empowers government officials to issue licences, approvals, orders, and administrative monetary penalties.

The decisions that may be appealed under the *Water Sustainability Act*, and the persons who may appeal them, are set out in section 105(1) of the *Act*. The *Act* states that, except as otherwise provided in the *Act*, an order resulting from an exercise of discretion of the comptroller, a water manager or an engineer may be appealed to the Board by the person who is subject to the order, an owner whose land is or is likely to be physically affected by the order (subject to an exception in section 105(2)), the owner of the works that are the subject of the order, or the holder of an authorization, a riparian owner, or an applicant for an authorization who considers that his or her rights are or will be prejudiced by the order.

Certain sections of the *Act* state that particular orders may not be appealed to the Board. For example, section 87(3) of the *Act* states that an order by the comptroller under section 87(1) (determining the critical environmental flow threshold for a stream once a significant water shortage declaration has been issued) is final and may not be appealed.

The time limit for filing an appeal is 30 days after notice of the order being appealed is delivered to the person commencing the appeal. The Board can order a stay of the order under appeal.

Water Users' Communities Act

The *Water Users' Communities Act* provides for water users' communities. A water users' community is a group of six or more water licensees, each with their own licence(s), who create and maintain a system to store and deliver water. Water users' communities are incorporated and named by the comptroller. A water users' community may acquire, hold and control property and water licences. The community may also acquire, construct, hold, maintain, improve, replace and operate works. The provisions in the *Water Users' Communities Act* were previously in Part 3 of the *Water Act* before it was replaced by the *Water Sustainability Act*.

Section 100.1(1)(b) of the *Water Users' Communities Act* adopts the appeal provisions in section 105 of the *Water Sustainability Act*.

Wildlife Act

The *Wildlife Act* regulates the use, allocation, ownership, import and export of fish and wildlife in BC, and empowers government officials to issue licences, permits, certificates, and orders, and to impose administrative penalties for non-compliance. Activities regulated by this *Act* include hunting, angling in non-tidal waters, guide outfitting, and trapping.

Under section 101.1 of the *Wildlife Act*, a decision of a regional manager or the director that

affects a licence, permit, registration of a trapline or guiding territory certificate, or an application for any of those things, may be appealed by the person who is affected by the decision.

The time limit for filing an appeal under the *Wildlife Act* is 30 days after notice is given.

The Board can order a stay of the decision under appeal.

Starting an Appeal

For all appeals, an appellant must prepare a notice of appeal and deliver it to the Board office within the time limit specified in the relevant statute. The notice of appeal must comply with the content requirements in section 22 of the *Administrative Tribunals Act*. It must identify the decision that is being appealed, state why the decision should be changed, contain the name, address, and telephone number of the appellant and of the appellant's agent (if any), the address for the delivery of notices regarding the appeal. Also, the notice of appeal must be signed by the appellant, or on his or her behalf by their agent, and the notice must be accompanied by a fee of $25 for each decision or order appealed. The Board has created a Notice of Appeal form that may be filled out on-line.

In addition, the Board requires a copy of the permit, licence, order or decision being appealed.

If the Board does not receive a notice of appeal within the specified time limit, the appellant will lose the right to appeal.

If the notice of appeal is missing any of the required information, the Board will notify the appellant of the deficiencies. The Board may refrain from taking any action on an appeal until the notice is complete and any deficiencies are corrected.

Once a notice of appeal is accepted as complete, the Board will notify the office of the official who made the decision being appealed. The decision-maker will be the respondent in the appeal.

Parties and Participants to an Appeal

A party to an appeal has a variety of important rights: the right to present evidence, cross-examine the witnesses of the other parties, and make opening and closing arguments. The person who filed the appeal (the appellant) and the decision-maker (the respondent) are parties to the appeal.

In addition to the appellant and respondent, the Board may add other parties to an appeal. As a standard practice, the Board will offer party status to a person who may be affected by the appeal such as the person holding the permit or licence which is the subject of an appeal by another person. In addition, a person may apply to the Board to become a party to the appeal if he or she may be affected by the Board's decision. These additional parties are referred to as "third parties" to the appeal.

The Board also has the discretion to invite any person to be heard in the appeal, without making that person a party to the appeal. This may be done on the Board's initiative or as a result of a request. The Board refers to these people as "participants". If a person applies to participate in an appeal, the Board will decide whether the person should be granted participant status and, if so, the extent of that participation. In all cases, a participant may only participate in a hearing to the extent that the Board allows.

Stays

A "stay" has the effect of postponing the legal obligation to implement all or part of a decision or order under appeal until the Board has held a hearing, and issued its decision on the appeal.

The Board has the power to stay most decisions under appeal, with some exceptions. An appeal automatically acts as a stay in some cases. For

example, an appeal of administrative monetary penalty under the *Water Sustainability Act* or the *Greenhouse Gas Industrial Reporting and Control Act* automatically delays the imposition of the penalty until the appeal is concluded. If an administrative monetary penalty imposed under *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* is appealed, the penalty is not recoverable until the appeal concluded. Similarly, monetary penalties imposed under the *Environmental Management Act* and the *Integrated Pest Management Act* are not due until 30 days after either the delivery of a final decision on an appeal, or a new determination rendered if the matter was sent back.

Even if the Board has the authority to grant a stay, the Board may decide not to do so. A stay is an extraordinary remedy that a person must apply for. For the Board to grant a stay, the applicant must satisfy a particular legal test. That test is described later in this report under the heading "Summaries of Decisions: Preliminary Applications".

Dispute Resolution

The Board encourages parties to resolve the issues underlying an appeal at any time in the appeal process. The Board's procedures for assisting in dispute resolution are as follows:

- early screening of appeals to determine whether the appeal may be resolved without a hearing;
- pre-hearing conferences; and
- mediation, upon consent of all parties.

These procedures give the parties an opportunity to resolve the issues underlying the appeal and avoid the need for a formal hearing. If the parties reach a mutually acceptable agreement, the parties may set out the terms and conditions of their settlement in a consent order which is submitted to the Board for its approval. Alternatively, the appellant may withdraw their appeal at any time.

Pre-hearing Conferences

The Board, or any of the parties to any appeal, may request a pre-hearing conference. Pre-hearing conferences provide an opportunity for the parties to discuss any procedural issues or problems, to resolve the issues between the parties, and to deal with any preliminary concerns.

A pre-hearing conference will normally involve the spokespersons for the parties, one Board member and one staff member from the Board office. It will be less formal than a hearing and will usually follow an agenda, which is set by the parties. The parties are given an opportunity to resolve the issues themselves, giving them more control over the process.

If all of the issues in the appeal are resolved, there will be no need for a full hearing. Conversely, it may be that nothing will be agreed upon, or some issues still remain, and the appeal will proceed to a hearing.

Scheduling a Hearing

After a notice of appeal is accepted by the Board, the chair will determine which member(s) of the Board will hear the appeal and the type of appeal hearing. A hearing may be conducted by way of written submissions, an oral (in person) hearing, or a combination of both.

If the chair decides that the issues in the appeal can be fairly decided on the basis of written submissions, the chair will schedule a written hearing. Prior to ordering a written hearing, the Board may request the parties' input.

If the chair decides that an oral (in person) hearing is required in the circumstances, the chair must set the date, time and location of the hearing and notify the parties and any other persons who are entitled to notice of the hearing. It may be held in

the locale closest to the affected parties, at the Board office in Victoria or anywhere in the province.

Regardless of the type of hearing scheduled, the Board has the authority to conduct a "new hearing" on the matter before it. This means that the Board may hear the same evidence that was before the original decision-maker, as well as receive new evidence.

Written Hearings

If it is determined that a hearing will be by way of written submissions, the chair will invite all parties to provide submissions and will establish the due dates for the submissions. The general order of submissions is as follows. The appellant will provide its submissions, including its evidence, first. The other parties will have an opportunity to respond to the appellant's submissions when making their own submissions, and to present their own evidence.

The appellant is then given an opportunity to comment on the submissions and evidence provided by the other parties.

Oral Hearings

Oral (in person) hearings are normally scheduled in cases where there is some disagreement on the facts underlying the dispute, or where there is a need to hear the parties' evidence and assess the credibility of witnesses.

To ensure the hearing proceeds in an expeditious and efficient manner, in advance of the hearing, the chair asks the parties to provide the Board, and each of the parties to the appeal, with a written Statement of Points (a summary of the main issues, evidence, witnesses, and arguments to be presented at the hearing) and all relevant documents.

Board hearings are less formal than hearings before a court. However, some of the Board's oral hearing procedures are similar to those of a court: witnesses give evidence under oath or affirmation and witnesses are subject to cross-examination. In addition, each party to the appeal may have a lawyer or other spokesperson represent them at the hearing, but this is not required. The Board will make every effort to keep the process open and accessible to parties not represented by a lawyer.

All hearings before the Board are open to the public.

Evidence

The Board has full discretion to receive any information that it considers relevant and will then determine what weight to give the evidence when making its decision.

Experts

An expert witness is a person who, through experience, training and/or education, is qualified to give an opinion on certain aspects of the subject matter of the appeal. To be an "expert" the person must have knowledge that goes beyond "common knowledge".

The Board is not bound by the provisions relating to expert evidence in the *BC Evidence Act*. However, the Board does require 84 days advance notice that expert evidence will be given at a hearing. The notice must include a brief statement of the expert's qualifications and areas of expertise, the opinion to be given at the hearing, and the facts on which the opinion is based.

Obtaining an Order for Attendance of a Witness or Production of Documents

If a proposed witness refuses to attend a hearing voluntarily or refuses to testify, a party may ask the Board to make an order requiring the person to attend a hearing and give evidence. Also, if a person refuses to produce particular relevant documents in their possession, a party may ask the Board to order the person to produce a document or other thing prior to, or during, a hearing.

Section 93.1 of the *Environmental Management Act* and subsection 34(3) of the *Administrative Tribunals Act* provide the Board with the power to require the attendance of a witness at a hearing, and to compel a witness to produce for the tribunal, or a party to the appeal, a document or other thing in the person's possession or control that is admissible and relevant to an issue in the appeal.

The Decision

To make its decision, the Board is required to determine, on a balance of probabilities, what occurred and to decide the issues that are raised in the appeal.

The Board will not normally make a decision at the end of the hearing. Instead, in the case of both an oral and a written hearing, the final decision will be given in writing within a reasonable time following the hearing. Copies of the decision will be given to the parties, the participants, and the appropriate minister(s).

There is no right of appeal to the courts from a Board decision. A party dissatisfied with a decision or order of the Board may apply to the BC Supreme Court for judicial review of the decision pursuant to the *Judicial Review Procedure Act*. Under section 57 of the *Administrative Tribunals Act*, a judicial review application must be commenced within 60 days of the date that the Board's decision is issued. Alternatively, section 97 of the *Environmental Management Act* allows Cabinet to vary or rescind an order or decision of the Board if it is in the public interest to do so.

Costs

The Board also has the power to award costs. In particular, it may order a party or participant to pay all or part of the costs of another party or participant in connection with the appeal. The Board's policy is to only award costs in special circumstances.

In addition, if the Board considers that the conduct of a party has been improper, frivolous, vexatious or abusive, it may order that party to pay all or part of the expenses of the Board in connection with the appeal.

Legislative Amendments Affecting the Board

The *Administrative Tribunals Act* now applies to the Board

On December 17, 2015, changes were made to the legislation that sets out the Board's powers and procedures. These changes were part of a larger initiative implemented under the *Administrative Tribunals Statutes Amendment Act, 2015*, S.B.C. 2015, c. 10. The amendments bring the Board fully under the *Administrative Tribunals Act*. Previously, the Board was subject to the *Administrative Tribunals Act*'s predecessor enactment, the *Administrative Tribunals Appointment and Administration Act*, and was only given a few powers under the *Administrative Tribunals Act*. The *Administrative Tribunals Appointment and Administration Act* was repealed as part of the 2015 amendments.

Parts 1, 2, 3, 4 (except sections 23, 24, 33, and 34(1) and (2)), 6, 7, 8, sections 57, 59.1, 59.2, and 60 of the *Administrative Tribunals Act* now apply to the Board pursuant to section 93.1 of the *Environmental Management Act*. The appeal provisions in the *Environmental Management Act*, *Greenhouse Gas Industrial Reporting and Control Act*, *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, *Integrated Pest Management Act*, *Water Sustainability Act*, and *Wildlife Act* have been either repealed and replaced, or amended. In addition, the *Environmental Appeal Board Procedure Regulation* was repealed and replaced.

Although the changes to the legislation are extensive, the Board's procedures and powers generally remain the same. The changes did not affect who may file an appeal, what types of decisions may be appealed, whether parties or interveners may be added to an appeal, or the Board's powers in deciding the merits of an appeal. Those matters are still addressed in each Act under which the Board hears appeals.

However, there are a few notable changes. In particular, section 57 of the *Administrative Tribunals Act* now applies to the Board, and provides that a judicial review of a Board decision must be commenced within 60 days of the date the decision is issued. Previously, there was no time limit for initiating a judicial review of a Board decision. In addition, the Board has been given some new powers under the *Administrative Tribunals Act*, such as:

- the power to create rules of practice and procedure under section 11 of the *Administrative Tribunals Act*;
- the power to order a summary dismissal under section 31 of the *Administrative Tribunals Act*; and
- the authority to exclude the public from a hearing in certain circumstances, and/or to receive evidence in confidence (sections 41 and 42 of the *Administrative Tribunals Act*).

Appeals under the new *Greenhouse Gas Industrial Reporting and Control Act*

On January 1, 2016, most sections of the *Greenhouse Gas Industrial Reporting and Control Act*, S.B.C. 2014, c. 29 (the "*GGIRC Act*"), were brought into force. Several regulations under the *GGIRC Act* were also brought into force, including the *Greenhouse Gas Emission Administrative Penalties and Appeals Regulation* (the "*Penalties and Appeals Regulation*"). The *GGIRC Act* and the *Penalties and Appeals Regulation* provide for appeals to the Board. The *GGIRC Act* repeals the *Greenhouse Gas Reduction (Cap and Trade) Act*, under which the Board previously heard appeals.

The types of decisions that may be appealed to the Board under the *GGIRC Act* have already been set out in this annual report. The Board's powers and procedures in Division 1 of Part 8, and sections 101, 102(2) and 103 of the *Environmental Management Act* apply to appeals under the *GGIRC Act*.

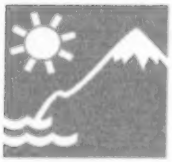
Appeals under the new *Water Sustainability Act* and *Water Users' Communities Act*

On February 29, 2016, most sections of the *Water Sustainability Act*, S.B.C. 2014, c. 15 (the "*WSA*"), were brought into force. Several new regulations under the *WSA* were also brought into force, including the *Groundwater Protection Regulation* and the *Water Sustainability Regulation*. The *WSA* replaces the *Water Act*, most of which has been repealed. The *Water Regulation* and the *Sensitive Streams Designation and Licensing Regulation* were also repealed. Certain provisions from the *Fish Protection Act* regarding sensitive streams, bank-to-bank dams, fish population protection orders, and stream protection were moved to the *WSA*.

The *WSA* and its regulations include new and improved requirements for protecting fish and aquatic ecosystems, groundwater use and licensing, well construction and maintenance, dam safety, and compliance. For example, those who use groundwater for non-domestic purposes now require a water licence. For existing groundwater users, the regulations provide a three-year transition period in which to apply for a licence. In addition, the *WSA* requires the consideration of the environmental flow needs of a stream in licensing decisions, and provides new powers to be applied when streams are at risk of falling, or have fallen, below their critical environmental flow thresholds to modify the existing precedence of water use for the purpose of protecting the aquatic ecosystem, aquifers, and essential domestic uses. The *WSA* also authorizes an administrative monetary penalty scheme.

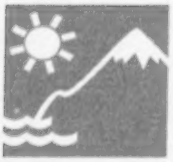
Section 105 of the *WSA* provides for appeals to the Board. Some language in the new appeal provision is different from what was in the *Water Act*, and standing to appeal has been slightly expanded. In terms of the decisions that may be appealed to the Board, "an order resulting from an exercise of discretion of the comptroller, a water manager or an engineer" may be appealed except as otherwise provided in the *WSA*. Certain sections of the *WSA* expressly state that a particular type of order may not be appealed. However, the Board's powers on an appeal are unchanged, and the Board's powers and procedures in Division 1 of Part 8 of the *Environmental Management Act* apply to appeals under the *WSA*.

Limited portions of the *Water Act* related to water users' communities were retained under a re-named Act, the *Water Users' Communities Act*. The Board hears appeal under that Act. The appeal provisions in section 105 of the *WSA* are adopted in section 100.1(1)(b) of the *Water Users' Communities Act*.



Recommendations

No issues arose during this reporting period that would warrant a recommendation.



Statistics

The following tables provide information on the appeals filed with the Board, and decisions published by the Board, during this reporting period. The Board publishes all of its decisions on the merits of an appeal, and most of the important preliminary and post-hearing decisions. The Board also issues hundreds of unpublished decisions on a variety of preliminary matters that are not included in the statistics below.

Between April 1, 2015 and March 31, 2016, a total of 143 appeals were filed with the Board against 29 administrative decisions. No appeals were filed or heard under the *Greenhouse Gas Industrial Reporting and Control Act* or the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*. The Board issued a total of 91 decisions, of which 40 were published.

April 1, 2015 – March 31, 2016

Total appeals filed	143
Total appeals closed	57
Appeals abandoned or withdrawn	17
Appeals rejected, jurisdiction/standing	8
Hearings held on the merits of appeals:	
Oral hearings completed	4
Written hearings completed	3
Total hearings held on the merits of appeals*	7
Total oral hearing days	37
Decisions issued:	
Appeals allowed	4
Appeals allowed, in part	0
Appeals dismissed	24
Final regular decisions	28
Final decisions resulting from applications**	12
Consent Orders	4
Costs Decisions	2
Preliminary Decisions	45
Total decisions	91

▲

This table provides an overview of the total appeals filed, hearings held, and decisions issued by the Board during the report period. It should be noted that the number of decisions issued and hearings held during the report period does not necessarily reflect the number of appeals filed for the same period, because the appeals filed in previous years may have been heard or decided during the report period.

It should also be noted that two or more appeals may be heard together.

Notes:

* Most preliminary applications and post-hearing applications are conducted in writing. However, only the final hearings on the merits of the appeal have been included in this statistic.

** This statistic includes applications for summary dismissal, for an order under section 17 of the *Administrative Tribunals Act*, etc.

Appeal Statistics by Act

	Environmental Management Act	Greenhouse Gas Industrial Reporting and Control Act	Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act	Integrated Pest Management Act	Water Act/ Water sustainability Act	Wildlife Act	Total
Appeals filed during report period	121			1	12	9	143
Appeals closed – final regular decision	2				20	6	28
Appeals closed – consent order					4		4
Appeals closed - abandoned or withdrawn	4				9	4	17
Appeals closed - rejected jurisdiction/standing	6			1	1		8
Total appeals closed	12			1	34	10	57
Hearings held on the merits of appeals							
Oral hearings	1				3		4
Written hearings						3	3
Total hearings held on the merits of appeals	1				3	3	7
Total oral hearing days	22				15		37
Decisions issued							
Final decisions	7				24	9	40
Consent orders					4		4
Costs decisions	2						2
Preliminary applications	26				17	2	45
Total decisions issued							91

▲

This table provides a summary of the appeals filed, hearings held and published decisions issued by the Board during the report period, categorized according to the statute under which the appeal was brought.

Summaries of Board Decisions

April 1, 2015 ~ March 31, 2016

Appeal cases are not heard by the entire Board, they are heard by a "panel" of the Board. As noted earlier in this report, once an appeal is filed, the chair of the Board will decide whether the appeal should be heard and decided by a panel of one or by a panel of three members of the Board. The size and the composition of the panel (the type of expertise needed on a panel) generally depends upon the subject matter of the appeal and/or its complexity. The subject matter and the issues raised in an appeal can vary significantly in both technical and legal complexity. The chair makes every effort to ensure that the panel hearing an appeal will have the depth of expertise needed to understand the issues and the evidence, and to make the decisions required.

In terms of its decision-making authority, a panel has the power to confirm, vary or rescind the decision under appeal. In addition, under all of the statutes, a panel may also send the matter back to the original decision-maker with or without directions, or make any decision that the original decision-maker could have made and that the panel believes is appropriate in the circumstances. When an appellant is successful in convincing the panel, on a balance of probabilities, that the decision under appeal was made in error, or that there is new information that results in a change to the original decision, the appeal is said to be "allowed". If the appellant succeeds in obtaining some changes to the decision, but not all of the changes that he or she asked for, the appeal is said to be "allowed in part". When an appellant fails to establish that the decision was incorrect on the facts or in law, and the Board upholds the original decision, the appeal is said to be "dismissed".

Not all appeals proceed to a hearing and a decision by the Board. Some cases are withdrawn or abandoned by an appellant before a hearing. In other cases, an appellant's standing to appeal may be challenged, or the Board's jurisdiction over the appeal may be challenged, resulting in the Board dismissing the appeal in a preliminary decision. In addition, the Board is called upon to make a variety of other preliminary decisions, some which are reported and others that are not. Examples of some of the preliminary decisions made by the Board have been provided in the summaries below.

It is also important to note that many cases are also settled or resolved prior to a hearing. The Board encourages parties to resolve the matters under appeal either on their own or with the assistance of the Board. Sometimes the parties will reach an agreement amongst themselves and the appellant will simply withdraw the appeal. At other times, the parties will set out the changes to the decision under appeal in a consent order and ask the Board to approve the order. The consent order then becomes an order of the Board. In the summaries, the Board has included an example of a case that resulted in a consent order.

The summaries that have been selected for this Annual Report reflect the variety of subjects and the variety of issues that come before the Board in any given year. The summaries have been organized into preliminary applications decided by the Board, and decisions on the merits of the appeal. The summaries of final decisions are further organized by the statute under which the appeal was filed. Please refer to the Board's website to view all of the Board's published decisions and their summaries.

Preliminary Applications and Decisions

Jurisdictional Issues

For the Board to have jurisdiction over an appeal, certain requirements in the Board's enabling legislation must be met. Generally, the legislation sets out requirements such as the categories of decisions that may be appealed, the categories of persons who may file appeals, and the time limits for filing an appeal. All of the applicable legislative requirements must be met before the Board has jurisdiction to hear an appeal.

Over the years, there have been many cases in which the Board has been asked to determine, as a preliminary matter, whether the person filing an appeal has "standing" to appeal, i.e., whether the person falls within a category of persons who may file an appeal under a specific Act. The requirements for "standing" vary from one Act to another. For example, under section 101(1) of the *Environmental Management Act*, an appeal may be initiated by a "person aggrieved by a decision".

Similarly, the Board must sometimes make a preliminary determination about whether the decision or order being appealed is appealable under the applicable legislation, as the types of decisions or orders that may be appealed vary from one Act to another. For example, specific types of decisions may be appealed under the *Environmental Management Act*. Section 99 of that Act defines "decision" for the purposes of an appeal.

The following summaries include examples of preliminary decisions regarding who has "standing" to appeal, and the types of decisions that may be appealed to the Board.

A labour union appeals air emissions in the workplace

2014-EMA-005(b) Unifor Local 2301 v. Director, *Environmental Management Act* (Rio Tinto Alcan Inc., Third Party)

Decision Date: November 16, 2015

Panel: Alan Andison

This decision was the Board's reconsideration of whether an approval of an environmental effects monitoring plan (the "Plan") was an appealable "decision" as defined in the *Environmental Management Act* (the "Act"), and if so, whether Unifor Local 2301 ("Unifor") had standing under the Act to appeal the approval of the Plan. The Plan applies to emissions from an aluminum smelter operated by Rio Tinto Alcan Inc. ("Rio Tinto") in Kitimat, BC. Unifor is a union that represents the smelter's workers and retired workers, many of whom live in the Kitimat area.

Rio Tinto was required to prepare the Plan, and implement it once approved, under a condition in a permit amendment that the Director had issued in 2013. The amendment applied to Rio Tinto's permit authorizing emissions from the smelter. In addition to requiring the Plan, the amendment also increased the maximum daily limit on sulphur dioxide emissions from the smelter. When the Plan was approved, the amendment was already the subject of appeals filed by two Kitimat residents, Elisabeth Stannus and Emily Toews. Unifor did not appeal the amendment.

In October 2014, the Director approved the Plan. Ms. Stannus, Ms. Toews, and Unifor filed separate appeals against the approval of the Plan. Unifor appealed on several grounds, including concerns about the impact of the Plan on the health of workers at the smelter. In support of its appeal, Unifor provided affidavit evidence that workers at the smelter have disproportionately high rates of cancer and respiratory illnesses, and that a significant number of workers work partially or primarily outdoors and are exposed to airborne emissions.

Before accepting the appeals against the Plan, the Board requested submissions from the parties regarding whether the approval of the Plan was an appealable "decision" as defined by section 99 of the *Act*, and whether the Appellants had standing to appeal as "persons aggrieved" by the Plan under section 100(1) of the *Act*.

The Board found that the Director's approval of the Plan was not an appealable "decision" as defined by section 99 of the *Act* (Emily Toews, Elisabeth Stannus, and Unifor Local 2301 v. Director, *Environmental Management Act* (Decision No. 2014-EMA-003(a), 004(a), 005(a), December 4, 2014)). Rather, the Board found that the Plan was incidental to, and flowed from, the permit amendment issued in 2013, which was appealed by Ms. Stannus and Ms. Toews but not Unifor. Given the Board's finding that the approval of the Plan was not appealable, it was unnecessary to decide whether the Appellants had standing to appeal the Plan. The appeals were rejected as being outside of the Board's jurisdiction.

Unifor sought a judicial review of the Board's decision. On September 4, 2015, the BC Supreme Court set aside the Board's decision as it pertained to Unifor, and remitted the matter back to the Board for reconsideration (*Unifor Local 2301 v. British Columbia (Environmental Appeal Board)*, 2015 BCSC 1592). Specifically, the Court found that the Board's interpretation of "decision" in section 99 of the *Act* was unreasonable. The Court held that the approval of the Plan ought to have been considered part of a two-stage decision-making process involving the permit amendment. The Court concluded that the approval of the Plan was part of the permit amendment decision, and therefore, the approval of the Plan was appealable as a "decision" under one of the subsections of section 99 of the *Act*. The Court did not specify which subsection within section 99 applied.

In accordance with the Court's directions, the Board reconsidered whether the approval of the Plan was an appealable "decision" as defined in section 99 of the *Act*, and if so, whether Unifor had standing to appeal as a "person aggrieved" by the approval of the Plan under section 100(1) of the *Act*.

On the first issue, the Board noted the Court's finding that the approval of the Plan was the second stage of a two-stage decision-making process involving the permit amendment. On that basis, the Board concluded that the approval of the Plan was appealable under the same subsection as the permit amendment; namely, subsection 99(d) of the *Act*.

Turning to the issue of standing, the Board found that Unifor had provided sufficient evidence, on a prima facie basis, to establish that the approval of the Plan prejudicially affected its interests. Specifically, Unifor provided evidence that its members' health may be affected by alleged deficiencies in the Plan regarding the potential health impacts of the increase in sulphur dioxide emissions that was authorized in the permit amendment. Consequently, the Board concluded that Unifor was a "person aggrieved" by approval of the Plan, and therefore, had standing under section 100(1) of the *Act* to appeal approval of the Plan.

Accordingly, the Board found that it had jurisdiction over Unifor's appeal.

Application for water licence denied

2009-WAT-015(a) Greengen Holdings Inc. v. Regional Water Manager (Chief Ian Campbell in his own right and on behalf of the Squamish First Nation, Participant)

Decision Date: November 19, 2015

Panel: Robert Wickett, Q.C.

In 2009, Greengen Holdings Inc. ("Greengen") appealed a decision denying its application for a water licence on Fries Creek for power purposes. The water licence application was denied by the Regional Water Manager (the "Manager"), Ministry of Environment (now the Ministry of Forests, Lands and Natural Resource Operations) (the "Ministry"). Greengen sought the water licence as part of a proposed hydro power project. Fries Creek is within the traditional territory of the Squamish First Nation ("SFN").

Shortly before the Manager denied Greengen's application for a water licence, a statutory decision-maker under the *Land Act* had denied Greengen's application for Crown land tenure to build an access road and construct works for the hydro power project. There is no statutory appeal process for decisions under the *Land Act*. Greengen could have applied for a judicial review of that decision, but it did not. As a result, Greengen had no authorization to access or use Crown land to develop the hydro power project.

At Greengen's request, the appeal of the water licensing decision was held in abeyance for several years to allow the parties time to attempt to resolve the matter. The matter was not resolved, and in September 2014, Greengen requested that the appeal be set down for a hearing. The hearing was scheduled to commence in January 2016.

In September 2015, the Manager raised a preliminary issue regarding the Board's jurisdiction to grant the remedy sought by Greengen; namely, to approve the issuance of a water licence to Greengen. The Manager submitted that Greengen held no interest in land to which a water licence could be appurtenant as required by the *Water Act*, and therefore, Greengen did not meet the eligibility requirements under section 7 of the *Water Act* for holding a water licence. On that basis, the Manager submitted that the appeal should be dismissed.

Before deciding the preliminary issue, the Board offered Greengen and the SFN an opportunity to make written submissions. The SFN supported the Manager's objection, and the SFN requested that it be granted costs if the appeal was dismissed.

The Board considered whether the appeal should be dismissed on the basis that the remedies sought by Greengen were beyond the Board's jurisdiction. The Board found that a water licence must comply with the statutory requirements of a "licence" as defined in section 7 of the *Water Act*. Section 7(a) provides that a licence may be issued to "an owner of land…." The word "owner" is defined in the *Water Act* to mean "a person entitled to possession of any land, … and includes a person who has a substantial interest in the land…." Section 7 does not provide for the issuance of a licence to a person who will, or may, become an "owner", but rather, only a person who is an "owner". Therefore, the Board found that the Manager could not issue a licence conditional upon the licence holder becoming, at some future time, an "owner". As such, even if Greengen was successful on the merits of its appeal, the Board could neither order that a licence be issued to Greengen subject to a condition that Greengen become an "owner", nor direct the Manager to issue such a licence. Consequently, the Board dismissed the appeal for lack of jurisdiction to provide the remedies sought by Greengen.

In addition, the Board concluded that there were no special circumstances that warranted an award of costs in favour of either the SFN or Greengen.

Accordingly, the appeal was dismissed. The applications for costs were denied.

An Extraordinary Remedy – the Power to Order a Stay

An appeal to the Board does not automatically prevent the decision under appeal from taking effect. The decision under appeal remains valid and enforceable unless the Board makes an order to temporarily "stay" the decision. A temporary stay prevents the decision from taking effect until the appeal is decided.

If a party wants to postpone the decision from taking effect until after the appeal is decided, the party must apply to the Board for a stay and address the following issues:

- whether the appeal raises a serious issue to be decided by the Board;
- whether the applicant for the stay will suffer irreparable harm if a stay is not granted; and
- whether there will be any negative consequences to property (real or economic), the environment or to public health or safety if the decision is stayed until the appeal is concluded (the balance of convenience test).

When addressing the issue of irreparable harm, the party seeking the stay must explain what harm it would suffer if the stay was refused and why this harm is "irreparable" (i.e., it could not be remedied if the party ultimately wins the appeal). "Irreparable" has been defined by the Supreme Court of Canada as follows:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision …, where one party will suffer permanent market loss or irrevocable damage to its business reputation …, or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined.

In addressing the issue of "balance of convenience", the party seeking the stay must show that it will suffer greater harm from the refusal to grant a stay than the harm suffered by the other parties or the environment if the stay is granted.

Stay denied: dams pose risks to public safety, property, and the environment

2015-WAT-004(a) City of Nanaimo v. Comptroller of Water Rights

Decision Date: June 30, 2015

Panel: Alan Andison

The City of Nanaimo (the "City") appealed an order issued by the Comptroller of Water Rights (the "Comptroller"), Ministry of Forests, Lands and Natural Resource Operations. The order was issued in response to the City's alleged failure to meet the requirements of section 7.1 of the *British Columbia Dam Safety Regulation* (the "*Regulation*"). The order required the City to correct the potential safety hazard posed by two dams on the Chase River. The dams were built in 1910 to 1911 to supply water to coal mines. The reservoirs behind the dams are now part of a public park. The City holds the water licences that authorize the dams.

Beginning in about 2002, the City became aware of concerns regarding the dams' ability to withstand floods and earthquakes. After several years of studies, an engineering consultant determined that the threat level, in terms of consequences to people and property if the dams failed, was extreme. In 2012, the City applied to the Comptroller for authorization to remove the dams and restore the Chase River to its natural state. However, this led to strong public opposition.

Consequently, in 2013, the City decided to pursue a strategy of mitigating the risk posed by the dams. The City asked an engineering consultant to investigate remedial options to address the dams' safety, and to review the degree of hazard posed by the dams. In addition, the City asked the Comptroller to put its application to remove the dams "on hold". The Comptroller agreed, but urged the City to adopt a plan quickly. In 2014, the City's engineering consultant recommended that the dams' hazard classification be reduced to "very high" for one dam and "high" for the other dam.

By a letter dated January 23, 2015, the Comptroller accepted the lowered hazard classifications for the dams but advised the City that both dams still had serious deficiencies that required immediate attention. Pursuant to section 7.1 of the *Regulation*, the Comptroller required the City to prepare a revised plan identifying the steps required to correct the safety hazards, and providing a timeline for completing those steps.

On April 9, 2015, the Comptroller issued an order to the City, stating that the City was not in compliance with the *Regulation*, and requiring the City to select from two remediation options for one of the dams. However, in late April 2015, the City asked the Comptroller to amend the order to allow consideration of a third option.

On April 29, 2015, the Comptroller revoked the April 9, 2015 order, and issued a new order. This order required the City to immediately take steps to increase the flood routing capacity of one of the dams, by selecting one of three remedial options and notifying the Comptroller by June 1, 2015 of the option selected. Regarding the second dam, the order required the City to: submit a revised plan by the end of 2015 that identifies the actions required to correct the safety hazard; establish a timeline to taking those actions; and, implement the revised plan by no later than the end of 2017.

The City appealed the April 29, 2015 order, on the basis that the Comptroller erred in assessing the hazard posed by the dams and the urgency of remedial actions. The City asked that the Board reverse the order, or alternatively, vary the order to give the City more time to consider remedial options. In the further alternative, the City requested that the Board vary the order to respect City Council's jurisdiction over decisions that fulfill municipal purposes. The City also requested a stay of the order, pending a decision from the Board on the merits of the appeal. The Comptroller opposed the stay application.

In determining whether a stay ought to be granted, the Board applied the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*. With respect to the first stage of the test, the Board found that the City's appeal raised serious issues to be decided, which were not frivolous, vexatious or pure questions of law.

Regarding the second part of the test, the Board found that denying a stay would not result in irreparable harm to the City. Although denying a stay would result in the City incurring expenses to comply with the order, such expenses would have to be incurred eventually, regardless of whether a stay was granted. The Board also found that the potential for political or public discontent, if the City had to comply with the order, did not constitute irreparable harm to the City.

Turning to the third part of the test, the Board found that the balance of convenience favoured denying a stay of the order. The risks associated with granting a stay outweighed the potential harm to the City's interests if a stay was denied. The Board found that significant and irreparable harm may result from granting a stay of the order, pending a decision on the merits of the appeal. Specifically, there was the potential for loss of life, damage to private and public property, and harm to the environment if the City did

not comply with the order and the dams failed. These risks outweighed the City's interest in protecting the park and recreational values associated with the dams.

Accordingly, the application for a stay was denied.

Final Decisions

Environmental Management Act

Kitimat residents appeal a permit amendment allowing increased SO_2 emissions in their airshed

2013-EMA-007(g) and 2013-EMA-010(g)
Emily Toews and Elisabeth Stannus v. Director, *Environmental Management Act* (Rio Tinto Alcan Inc., Third Party)

Decision Date: December 23, 2015

Panel: Brenda Edwards, Tony Fogarassy, Daphne Stancil

In April 2013, the Appellants appealed a decision of the Director, *Environmental Management Act* (the "Director"), Ministry of Environment, to amend a permit held by Rio Tinto Alcan Inc. ("Rio Tinto"). The permit authorizes the discharge of effluent, emissions, and waste from Rio Tinto's aluminum smelter located in Kitimat, BC. Rio Tinto sought the permit amendment in support of a project designed to modernize and increase the production at the smelter. Once the project is fully implemented in 2018, the smelter's emissions of polycyclic aromatic hydrocarbons, fluorides, and particulate matter will be reduced, but its sulphur dioxide (SO_2) emissions will increase.

The permit amendment was issued under section 16 of the *Environmental Management Act* (the "EMA"). Among other things, the amendment allows an increase in the smelter's emissions of SO_2: the previous limit was 27 tonnes per day; the new limit is 42 tonnes per day. The amendment also adds several conditions to the permit, including requirements to develop an environmental effects monitoring plan for the Director's approval, to conduct public consultations regarding the monitoring plan, and to implement the monitoring plan once it is approved. The Director approved Rio Tinto's monitoring plan approximately 18 months after he issued the permit amendment.

The Appellants requested an order setting aside or suspending the SO_2 limit in the amended permit. They also requested that the Board order the Director to secure certain studies and conduct further public consultation regarding the potential impacts of the increased SO_2 emissions on human health, soils, and vegetation, before rendering a decision on any future amendment to the permit.

In deciding the appeals, the Board considered three main issues:

1. Whether the process that preceded the issuance of the amendment was flawed due to breaches of natural justice or procedural fairness.

In deciding the first issue, the Board noted that it had conducted the appeals as a new hearing of the matter, and the evidence before the Board included information that was before the Director as well as new evidence. The new evidence included scientific studies, data, and investigations that were completed after the amendment was issued. The Board has broad remedial powers under the EMA, including the power to make any decision that the Director could have made. Consequently, any defects in the Director's decision-making process were cured by the appeal process, and it was unnecessary to address the Appellants' arguments alleging fettering, a reasonable apprehension of bias, or the adequacy of the Director's reasons for granting the amendment.

2. What is the proper legal test for considering whether to grant a permit amendment under section 16 of the *EMA*?

The Appellants argued that the Board should apply the precautionary principle in interpreting section 16 of the *EMA*. However, the Board found that if the legislature had intended the precautionary principle to be applied by decision-makers under the *EMA*, the legislature could have expressly indicated that, and it has not. The Board found that the *EMA* does not contemplate that permits may only be approved or amended if the result will be zero risk to the environment. The *EMA* deals with the competing interests of permitting waste to be introduced into the environment while also imposing requirements for the protection of the environment. In assessing the merits of the amendment, the Board decided to take a "cautious" approach involving a comprehensive technical analysis of the potential harm that the emissions may cause to human health and the environment. Harm or damage that may be caused by the emissions should be controlled, ameliorated and, where possible, eliminated. However, not all harm or damage will be eliminated, given that the permit allows the emission of "air contaminants", which is defined in the *EMA* as including substances that are capable of causing injury to human health and/or damage to the environment.

In addition, the Board found that section 16 of the *EMA* does not require the consideration of cumulative effects of SO_2 emissions from other facilities that may (or may not) be built in the area sometime in the future. The Board also held that the polluter pay principle does not apply in interpreting section 16 of the *EMA*.

3. Whether the information before the Board was adequate to confirm the issuance of the amendment under section 16 of the *EMA*.

The Appellants submitted that there was insufficient evidence to conclude that the amendment provided adequate protection for human health, soil and vegetation from the impacts of the increased SO_2 emissions. The Appellants argued that the main technical report that the Director relied on, and other information he considered, was scientifically inadequate or contained gaps regarding the potential impacts of the emissions. The Appellants and Rio Tinto provided expert evidence on those matters. The Appellants also argued that the public consultation process which was conducted before the Director issued the amendment was inadequate.

The Board found that the modernized smelter will have new 60-metre high stacks and other works which will disperse the SO_2 emissions differently than in the past. Regarding impacts on human health, the emissions modelling in the technical report predicted that SO_2 concentrations, even at the maximum of 42 tonnes per day, will be well below U.S. EPA standards 99% of the time in the residential and commercial areas of Kitimat. The Appellants' expert witness agreed that the technical report accurately predicted SO_2 levels. An independent professor of medicine reviewed the technical report, and concluded that the SO_2 increases "can be considered trivial in terms of health effects". The Northern Health Authority and BC Centre for Disease Control concluded that the technical report's approach was acceptable, its conclusions were generally consistent with the wider scientific literature, and mitigation efforts were appropriate. The Appellants' evidence did not establish otherwise. The Board concluded that the Appellants failed to establish that the amended SO_2 limit should be set aside or suspended, or that the Director should be ordered to obtain further

information regarding human health risks. The Board agreed with the Director that the risk to human health was acceptable, but should be monitored to confirm whether the actual impacts match the predicted impacts.

Regarding impacts on soils, the Appellants failed to establish that the analysis in the technical report regarding predicted impacts on soil, or the provisions in the monitoring plan with respect to soils, were flawed. Based on the evidence, the Board found that the risk to soils from the increased SO_2 emissions was acceptable, but should be monitored to confirm whether the actual impacts match those that were predicted.

Regarding impacts on vegetation, the Board found that the Appellants failed to establish that the analysis in the technical report regarding predicted impacts on vegetation, or the provisions in the monitoring plan with respect to vegetation, were flawed. Based on the evidence, the Board found that the risk to vegetation was acceptable, but should be subject to monitoring to confirm whether the actual impacts match those that were predicted.

Finally, regarding the adequacy of the public consultation process, the Board found that Rio Tinto complied with the applicable notification provisions in the *Public Notification Regulation*. Rio Tinto also complied with, and went beyond, the additional notification and consultation requirements that the Director imposed. Rio Tinto conducted several public meetings, and consulted with a wide range of government agencies, public health agencies, and community stakeholders regarding the application for the amendment. The Appellants' testimony confirmed that they were aware of Rio Tinto's application and the public meetings and information that were available to them, but chose not to attend the public sessions or obtain information packages. After the public meetings had concluded, one of the Appellants expressed concern to Rio Tinto about the emissions, and Rio Tinto met with her on a statutory holiday to discuss her concerns, even though Rio Tinto was not obliged to do so.

For all of those reasons, the Board confirmed the permit amendment, and dismissed the appeals.

Greenhouse Gas Industrial Reporting and Control Act

There were no decisions by the Board during this reporting period.

Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act

There were no decisions by the Board during this reporting period.

Integrated Pest Management Act

There were no published decisions by the Board during this reporting period.

Water Act/Water Sustainability Act

Well drillers must stop or control artesian well flow, but landowners are reponsible thereafter

2013-WAT-009(b) and 2013-WAT-025(b) John Vlchek, doing business as Cariboo Water Wells Ltd. v. Regional Water Manager (Hazel Collins, Third Party; Patrick and Rebecca Burton, Carson and Theresa Warncke, and Leslie and Sonya Warncke, Participants)

Decision Date: April 14, 2015

Panel: Maureen Baird, Q.C., Monica Danon-Schaffer, R.G. Holtby

A landowner hired John Vlchek, doing business as Cariboo Water Wells Ltd., to drill a domestic water well on her property located in Chetwynd, B.C. On August 30, 2012, Mr. Vlchek began drilling the well, and encountered artesian conditions involving a high flow of pressurized groundwater. On that day and during several days that followed, Mr. Vlchek took steps to control the artesian flow, including casing the well and installing valves to control the flow. On September 11, 2012, after the valves had been closed for 14 hours, Mr. Vlchek visited the site and found no leakage. He then opened two valves to allow water to flow along the property of the landowner and a neighbouring property towards a settling pond, as agreed by the landowner and the neighbouring property owner.

In early October 2012, staff from the Ministry of Forests, Lands and Natural Resource Operations (the "Ministry") inspected the site and observed turbidity in the water flowing from the valves, an indication that subsurface erosion was occurring. The Ministry staff also noted that the water flowing over the properties was not in a defined channel, and could pose a hazard to property or a nearby railway. In November and December 2012, Ministry staff again visited the site and noted potential safety concerns. However, those observations were not communicated to Mr. Vlchek or the landowners.

In early March 2013, a large sinkhole developed on the landowner's property. The sink hole appeared to be caused by underground flow from the well. Also, the surface water flow from the well appeared to be causing other problems or potential problems for the properties, the railway, power poles, and a nearby stream.

On March 28, 2013, the Ministry's Regional Water Manager (the "Regional Manager") issued an interim order requiring Mr. Vlchek to retain a qualified professional to prepare and submit a site remediation plan for the Regional Manager's approval, and to supervise carrying out measures to stabilize the area around the well and install a ditch or drainage course to drain the flow from the well to a stream. The order required the work to be completed by April 17, 2013. Mr. Vlchek appealed the interim order, and requested a stay of the order pending a decision from the Board on the merits of the appeal. On April 16, 2013, the Board denied the stay application (*John Vlchek v. Regional Water Manager*, Decision No. 2013-WAT-009(a)). Before the Board issued its decision, Mr. Vlchek complied with the interim order.

On August 30, 2013, the Regional Manager issued a second order to Mr. Vlchek, requiring him to permanently close the artesian well, and construct at least one relief well to reduce the groundwater pressure sufficiently to allow permanent closure of the well. Mr. Vlchek appealed the second order, and requested a stay of that order pending the Board's decision on the merits of the appeal. On October 13, 2013, the Board granted the stay application subject to certain conditions (Decision No. 2013-WAT-025(a)).

The Board conducted a joint hearing of the two appeals. Mr. Vlchek submitted that the second order was based on a misunderstanding of the facts and a misapplication of section 77(1)(a) of the *Water Act*. In particular, he argued that he had taken sufficient steps to ensure that the artesian flow was "stopped or brought under control" as required by section 77(1)(a) of the *Water Act*. He also argued that the second order was not necessary to protect the public, the environment, or groundwater resources.

First, the Board considered whether the appeal of the interim order was moot. The Board found that the two appeals engaged many of the same questions of fact and law, and therefore, the appeal of the interim order was not moot. The Board also found that no inefficiencies arose from hearing the appeals together.

Next, the Board considered whether the artesian flow was "stopped or brought under control" as required by section 77(1)(a) of the *Water Act*. The Board applied the principles of statutory interpretation to determine the meaning of "stopped or brought under control" in section 77(1)(a). After considering section 77(1)(a) in the context of the *Water Act* as a whole, the Board found that a well driller must stop or bring under control the artesian flow while the driller is constructing, or supervising the construction of, the well. However, under the *Water Act*, the landowner is responsible for the well once its construction is completed.

Based on the facts in this case, the Board found that Mr. Vlchek stopped the flow of the well for 14 hours during September 10 to 11, 2012, when the valves were turned off and the flow stayed within the well casings. The Panel further found that, even if the flow was not stopped permanently at that time, it was brought under control, because it could have been capped then and for several months thereafter, but the landowner and her neighbour chose to let the well water flow onto their land. The well was the landowner's responsibility once Mr. Vlchek brought the flow under control. In these circumstances, the Board concluded that there was no basis for the Regional Manager to issue either of the orders.

The orders were reversed, and the appeals were allowed.

Dam on Cowichan Lake provides downstream benefits without harming lakefront properties

2013-WAT-013(b), 015(c) 016(b), 017(c), 018(c) and 019(c) Ellen Weir, Greg Whynacht, D'Arcy Lubin, Ian R. Poyntz, Catherine Willows Woodrow, and Michael Dix on his own behalf and on behalf of the Cowichan Lake Recreational Community Inc. v. Deputy Comptroller of Water Rights (Catalyst Paper Corporation, Third Party; Cowichan Watershed Society, Participant)

Decision Date: May 21, 2015

Panel: Robert Wickett, Q.C., Daphne Stancil, Douglas VanDine

Cowichan Lake is a large freshwater lake on southern Vancouver Island, BC. It is located in the Cowichan Valley Regional District (the "CVRD") and is the source of the Cowichan River. Catalyst Paper Corporation ("Catalyst") holds two conditional water licences that authorize the storage and diversion of water flowing from Cowichan Lake into the Cowichan River. Under those licences, Catalyst operates a dam, weir, and gates which regulate the flow of water from Cowichan Lake into the Cowichan River, and Catalyst diverts water for use in its Crofton Pulp Mill. The licensed water works were constructed in 1956, and upgraded in 1965.

The licences also require Catalyst to release water from the water works for the benefit of the public, as directed by the Comptroller of Water Rights (the "Comptroller"), Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"). Over the years, the Comptroller has provided direction

regarding the operation of the water works. Since about 1990, the operational regime for water storage was governed by a "rule curve", which was developed by Catalyst, Fisheries and Oceans Canada, and the Provincial Ministry of Environment. The rule curve provided direction as to when the water works must be operated to regulate water flow. Typically, the gates were fully open from November to April, during the period of high water inflow to the lake, but the release of water was controlled during the summer to regulate water levels in Cowichan Lake and to protect minimum flows in the Cowichan River, which is a salmon-bearing stream. The 1990 rule curve specified that water would begin to be released on July 9, and a minimum water outflow of 7 m3/s would be maintained. It also specified target water levels for Cowichan Lake in July, August and September.

In 2007, the CVRD proposed changes to the 1990 rule curve, based on recommendations in a 2007 water management plan for the Cowichan Basin. The changes were intended to increase operational flexibility, meet human needs, and reduce the risks that low water levels pose to fish.

On November 30, 2012, the CVRD's board of directors passed a resolution requesting that the Province implement changes to the 1990 rule curve. During late 2012 and early 2013, the CVRD, Catalyst, the Deputy Comptroller, Fisheries and Oceans Canada, and an engineering consultant developed two proposals to amend the 1990 rule curve. One proposal required an amendment to Catalyst's water licences because it resulted in an increase in the maximum amount of water being stored. The second proposal did not result in an increase in the maximum amount of water being stored, but it delayed the date on which Catalyst could begin drawdown from the full water storage level, from July 9 to July 31.

In February and March 2013, the Deputy Comptroller created a Ministry website describing the two proposals, advertised the two proposals in two local newspapers, sent letters to all Cowichan Lake lakeshore property owners describing the proposals and requested their input, referred the proposals to six First Nations for comment, referred the proposals to several government agencies, and held a public meeting in Lake Cowichan about the proposals. Following the public meeting, the Deputy Comptroller received 14 letters objecting to the proposals. All of the letters were from lakeshore property owners, who expressed concern about the effects of the proposals on their properties. The Deputy Comptroller directed Ministry staff to visit 10 of the lakeshore properties to speak to the property owners, photograph the properties, and consider what might be done to mitigate their concerns. After considering that information, the Deputy Comptroller decided that the proposal to delay the drawdown to July 31 would not materially affect the rights of lakeshore property owners, and was in the public interest.

In May 2013, the Deputy Comptroller issued an order (the "Order") to Catalyst under section 88(1)(h) of the *Water Act*. The Order revised the 1990 rule curve and the requirements for the operation of the water works. Among other things, the Order requires that the control of water outflow shall not commence before April 1, unless otherwise specified by the Comptroller or the Regional Water Manager, and a minimum outflow of 7.08 m^3/s will be maintained. The Order also specifies maximum lake water levels for July 31, August 31, September 30, October 31, and November 5, but allows for a temporary increase of 0.1 m above the specified maximum levels in the event of abnormally high inflow to Cowichan Lake.

Six appeals were filed against the Order. All of the Appellants own lakeshore property on Cowichan Lake. The Appellants submitted that the Deputy Comptroller lacked the jurisdiction to make the Order because it increased the water storage

volume beyond what is authorized in Catalyst's water licences. They also argued that the process leading to the Order was unfair because the Deputy Comptroller did not give them a fair opportunity to be heard. Moreover, they argued that the Order was wrong on its merits, because it allows more water to be stored in the lake for a longer period of time, which will affect the Appellants' property rights and result in a loss of property use and a physical loss of property due to flooding and/or erosion. They requested that the Order be reversed, or alternatively, sent back to the Deputy Comptroller with directions.

First, the Board considered whether the Deputy Comptroller had the jurisdiction to make the Order. The Board found that the Order does not authorize water storage in excess of the amount specified in Catalyst's water licences. Rather, the Order allows for a temporary increase of 0.1 m above the target maximum lake levels, and requires Catalyst to release the water and return the lake to the target water level as soon as possible. This flexibility is intended to address abnormally high inflows into Cowichan Lake that are beyond Catalyst's control. Given that the Order does not allow additional water storage, an amendment to Catalyst's water licences was not required, and the Deputy Comptroller had the jurisdiction to make the Order.

Second, the Board considered whether the Deputy Comptroller provided the Appellants with a fair opportunity to be heard before making the Order. The Board concluded that the Deputy Comptroller provided the Appellants with notice of the proposed changes, and a fair opportunity to comment on the potential effects of the proposed changes on their interests.

Finally, the Board considered whether the Order was flawed. Based on the evidence, the Board found that the Order provides substantial downstream benefits to fisheries, water licensees, and water well users, by improving the likelihood of maintaining minimum water flows in the Cowichan River.

Regarding the Appellants' concern that the Order may result in increased periods of flooding on their properties, the Board found that the natural boundary of a lake can vary over time due to natural processes such as flooding and erosion, and lakeshore properties are exposed to those natural processes. The Board found that the present natural boundary of Cowichan Lake is higher than the full storage level specified for July 31, and the Order maintains the November date, used in the 1990 rule curve, on which the gates must be fully open and Catalyst ceases to control the lake level. Consequently, the Board concluded that the Order will not cause a substantial increase in the extent or duration of flooding on the Appellants' properties. The Board also found that there was no evidence that the Order will cause erosion of the Appellants' properties above the natural boundary of the lake.

Accordingly, the appeals were dismissed.

Appeal resolved by consent without the need for a hearing

2013-WAT-026(a) Lothar Vollmer v. Regional Hydrologist, acting as an Engineer under the *Water Act* (James McKitrick, Participant)

Decision Date: September 18, 2015

Panel: Alan Andison

Lothar Vollmer appealed an order issued by the Regional Hydrologist, Cariboo Region, Ministry of Forests, Lands and Natural Resource Operations, who was acting in his capacity as an engineer under the *Water Act*.

Mr. Vollmer owns lakefront land on Bowron Lake. For many years, a lodge has operated on Mr. Vollmer's property. A canoe rental business is operated out of the lodge. In or about October 2012, Mr. Vollmer had contractors conduct work on the foreshore in front of his property. A retaining wall was built, the foreshore was backfilled and topped with gravel, and a canoe storage rack was installed.

In September 2013, the Regional Hydrologist issued the order under sections 88(1)(d) and (e) of the *Water Act*. The Regional Hydrologist determined that the retaining wall was built below the natural boundary of Bowron Lake, and constituted an unauthorized change in and about a stream. The order required Mr. Vollmer to remove the retaining wall and fill from the foreshore of Bowron Lake, and restore the foreshore to a natural state, by the end of November 2013.

In October 2013, Mr. Vollmer appealed the order. He submitted that the retaining wall was necessary to protect his land and ensure safe access to the lake. He requested that the retaining wall be allowed to remain in place. Shortly after the appeal was filed, the Regional Hydrologist consented to a voluntary stay of the order, pending the Board's decision on the appeal.

After the order was issued under the *Water Act*, a survey of the retaining wall resulted in the issuance of further orders under other provincial legislation. In February 2014, the Ministry of Environment issued an order under the *Park Act* requiring Mr. Vollmer to remove a portion of the retaining wall that was within the boundaries of Bowron Lake Provincial Park. In March 2014, the Ministry of Transportation and Infrastructure issued an order under the *Transportation Act* requiring him to remove the canoe rack and the portion of the retaining wall that was within a public road right-of-way.

In May 2014, the Regional Hydrologist requested that the appeal hearing relating to the *Water Act* order be delayed, pending Mr. Vollmer's compliance with the other orders. Subsequently, parts of the retaining wall were removed.

Before the appeal was heard by the Board, the parties negotiated an agreement to resolve the matter. By consent of the parties, the Board reversed the order and issued a new order requiring Mr. Vollmer to plant native tree species on his land to stabilize the bank above the foreshore.

Accordingly, the appeal was dismissed, by consent.

Water licence for fracking cancelled due to technical flaws and inadequate consultation with a First Nation

2012-WAT-013(c) Chief Sharleen Gale in her own right and on behalf of the members of the Fort Nelson First Nation v. Assistant Regional Water Manager (Nexen Inc., Third Party; EOG Resources Canada Inc. and Devon Energy Canada Corporation, Participants)

Decision Date: September 3, 2015

Panel: Alan Andison, Les Gyug, Reid White

Chief Sharleen Gale, in her own right and on behalf of the members of the Fort Nelson First Nation (the "First Nation"), appealed a decision of the Assistant Regional Water Manager (the "Regional Manager"), Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), to issue a water licence to Nexen Inc. ("Nexen"). The Licence authorized Nexen to divert water from North Tsea Lake during April 1 and October 31 for five years, store the water in dugouts, and use it throughout the year in the hydraulic fracturing or "fracking" process to obtain natural gas from underground.

North Tsea Lake is a shallow lake surrounded by muskeg vegetation, and is connected to two other lakes via the Tsea River. North Tsea Lake is located northeast of Fort Nelson, within the First Nation's traditional territory. The First Nation's members have rights under Treaty 8 to hunt, fish, and trap within their traditional territory. The First Nation's members conduct traditional activities including hunting, fishing, and trapping in the vicinity of North Tsea Lake.

In 2007, Nexen began diverting water from North Tsea Lake and piping it to storage dugouts for use in the fracking process, pursuant to short-term (one-year) water use approvals issued under the *Water Act*.

In April 2009, Nexen applied for the Licence. Over the next three years, various telephone conversations, exchanges of correspondence, and meetings occurred between representatives of the Ministry, the First Nation, and Nexen. Also, Nexen and the First Nation agreed to have an independent expert review Nexen's proposed water withdrawal scheme. In the final months before the Licence was issued, the First Nation was still expressing concern about the proposed Licence, and sought further consultation with the Ministry. However, the Regional Manager decided that the Licence would have no significant impact on the environment or the First Nation's treaty rights. He also concluded that the First Nation had been given sufficient opportunity for consultation, but had failed to provide information about how its treaty rights may be affected by the Licence. The Regional Manager issued the Licence in May 2012.

The Licence authorized Nexen to divert up to 60,000 cubic metres of water per day, to a maximum of 2,500,000 cubic metres per year, from North Tsea Lake. The Licence contained certain conditions, including a requirement that withdrawals must cease when the flow of water in the Tsea River at a point downstream of North Tsea Lake fell below 0.351 cubic metres per second. The works authorized under the Licence were already in place, as they were constructed under Nexen's short-term approvals.

The First Nation appealed the Licence on the grounds that the provincial Crown failed to adequately consult with the First Nation before the Licence was issued, and the Regional Manager failed to adequately consider and assess the impacts that the Licence would have on the environment and the First Nation's treaty rights. The First Nation requested that the Licence be reversed, or alternatively, sent back to the Regional Manager with certain directions. The First Nation also requested that the Board order the Province to pay the First Nation's costs associated with the appeal.

The merits of the appeal were heard during a five-week oral hearing that included numerous technical documents and testimony from many witnesses, including several expert witnesses.

The two main issues in the appeal were: whether the Licence should be reversed due to technical flaws; and, whether the provincial Crown failed to adequately consult with the First Nation before the Licence was issued. The Board concluded that the Licence should be reversed due to serious technical flaws, as well as serious defects in the consultation process.

On the first issue, the Board found that the Licence was fundamentally flawed in both concept and operation. The Licence relied on a novel flow-weighted withdrawal scheme that was not supported by adequate data, scientific analysis, or appropriate hydrometric modelling. In addition, the Licence did not include requirements to monitor the flow rate in the Tsea River, on which the flow-weighted withdrawal scheme relied, or requirements to monitor the effects of the withdrawals on aquatic or riparian habitat and species. The failure of Nexen's stream flow monitoring program during drought conditions in 2012 resulted in Nexen continuing to withdraw water for several weeks in violation of the conditions in the Licence. The Board also found that the Licence was contrary to the purposes of the *Water Act*, in that it authorized Nexen to withdraw over double the volume of water per year that Nexen would use during the term of the Licence. Moreover, the information that was available to the Regional Manager, as well as field data that became available after the Licence was issued, did not support the Regional Manager's conclusion that the water withdrawals would have no significant impacts on fish, fish habitat, or wildlife. On the contrary, the Board found that the evidence

established that the water withdrawals could cause adverse effects on aquatic and riparian habitat, and the species that depend on that habitat.

Based on its conclusions under the first issue, the Board held that the appropriate level of consultation was in the mid-range of the spectrum, and not at the low end of the spectrum as asserted by the Regional Manager. In particular, the evidence established that the North Tsea Lake area was important to the First Nation's exercise of its treaty rights. The evidence also established a logical causal relationship between the water withdrawals, which diverted up to 14% of the estimated annual discharge at North Tsea Lake for a consumptive water use, and the potential for adverse impacts on habitat and species that the First Nation depended on for the exercise of its treaty rights.

Regarding the adequacy of the consultation process, the Board held that the Ministry was unclear with the First Nation regarding the consultation process that the Ministry intended to follow, the Ministry's expectations for the process, and the roles of the Ministry and Nexen in the process. The Ministry also failed to keep the First Nation regularly informed about the status of Nexen's application. Further, the Regional Manager considered insufficient information about the nature and extent of the First Nation's treaty rights in the North Tsea Lake area. This was partly due to his consideration of incorrect information about potential impacts, and his failure to consider the existence of a registered trapline near North Tsea Lake which was within the Crown's knowledge. However, the First Nation also failed to provide the Ministry with relevant information about the exercise of its treaty rights in the North Tsea Lake area, which was within the knowledge of its members. Although the First Nation lacked the capacity to respond to the Ministry's requests for more specific information during the early stages of the consultation process, the First Nation had the capacity to provide that information later in the process.

Despite those shortcomings, the Board found that the Ministry appeared to be genuinely willing to share and receive information with the First Nation up to January 2012. The evidence showed that, in the final months before the Licence was issued, the Ministry's approach changed. During a teleconference between staff of the Ministry staff and Nexen in January 2012, it was decided that the technical assessment of Nexen's application was complete and the Licence could be issued within months, but consultation with the First Nation remained a "major hurdle". Shortly thereafter, the Ministry issued a letter that gave the First Nation 30 days to respond to the Ministry's preliminary assessment that the Licence would have no significant impacts on the environment or the First Nation's treaty rights. In addition, internal Ministry correspondence during the final months of the consultation process indicated that, despite the Ministry's promises to meet with the First Nation to discuss its concerns, the Ministry had concluded that further consultation would give rise to no new information about potential impacts and would only delay the issuance of the Licence, which the Ministry intended to issue regardless of further discussions with the First Nation. Based on the evidence, the Board held that the Ministry failed to consult in good faith, and failed to uphold the honour of the Crown.

Regarding the appropriate remedy in the circumstances, the Board concluded that the decision to issue the Licence should be reversed, and the Licence should be cancelled such that no further water diversion would occur. However, the Board allowed Nexen to use the water that it already had in storage as of the date of the Board's decision. Finally, the Board concluded that there were no special circumstances in this case that warranted an order of costs in favour of the First Nation. Accordingly, the appeal was allowed, and the First Nation's application for costs was denied.

Company holding leases over Crown land is properly named as licensee for five hydropower projects

2014-WAT-002(a) to 2014-WAT-007(a) Harrison Hydro Project Inc., Fire Creek Project Limited Partnership, Lamont Creek Project Limited Partnership, Stokke Creek Project Limited Partnership, Tipella Creek Project Limited Partnership, and Upper Stave Project Limited Partnership v. Comptroller of Water Rights

Decision Date: December 8, 2015

Panel: James Mattison

Harrison Hydro Project Inc., Fire Creek Project Limited Partnership, Lamont Creek Project Limited Partnership, Stokke Creek Project Limited Partnership, Tipella Creek Project Limited Partnership, and Upper Stave Project Limited Partnership (collectively, the "Appellants") appealed an order issued by the Comptroller of Water Rights (the "Comptroller"), Ministry of Forests, Lands and Natural Resource Operations (the "Ministry").

In the order, the Comptroller concluded that naming Harrison Hydro Project Inc. ("Harrison") as the holder of five licences authorizing water use on five streams for hydro power projects, and billing water rentals for the licences collectively to Harrison, was in accordance with the *Water Act* and the *Water Regulation*. The Appellants had asked the Comptroller to name one of five limited partnerships (the Fire Creek Project Limited Partnership, Lamont Creek Project Limited Partnership, Stokke Creek Project Limited Partnership, Tipella Creek Project Limited Partnership, and Upper Stave Project Limited Partnership) (collectively, the "Limited Partnerships") as the respective licensee in each water licence, and to bill each Limited Partnership separately for water rental. If the Limited Partnerships were billed separately as individual licensees, the Ministry would charge a lower rate for water rental compared to the rate charged if Harrison held all five licences.

The powerhouse and works for each hydro power project are situated on Crown land. The water licences were issued in 2005 through 2006 to a corporate predecessor that had received licences of occupation over the Crown land for each power project. In 2007, the Limited Partnerships were created, with Harrison as the general partner for each Limited Partnership. Subsequently, the licence of occupation for each project was assigned to the respective Limited Partnership. Between 2008 and 2009, the licences of occupation were replaced by leases over the same Crown land. All of the leases were issued to Harrison under the *Land Act*, and Harrison was named in the Land Title Office registry as the lease holder in each case. Each water licence is appurtenant to the Crown land covered by the respective lease. However, according to the Appellants, Harrison held the leases for the benefit of the Limited Partnerships.

Until 2013, the Ministry had billed each Limited Partnership separately for the water rentals for each water licence. However, during 2012, the Ministry's regional office conducted a review of its records to ensure consistency in the information related to water licences and the information related to Crown land tenures. This review identified that Harrison held the Crown land leases on which the powerhouses for the five projects are located, but the water licences were held by the respective Limited Partnership. As a result, in 2013, the Ministry's regional office amended its records for the water licences to show the licensee as the entity that held the Crown lease; namely, Harrison. As a result, the Ministry adjusted the water rentals charged for the five projects. According to the Appellants, the water rental rates based on aggregated water use for the five projects were approximately 4.7 times higher than

the rates that would apply if each project was billed separately. In 2013, the Appellants objected to the Comptroller.

In December 2013, the Comptroller issued the order, in which he concluded that billing Harrison as a single licensee for water rentals for the five hydro power projects was in accordance with the *Water Act* and the *Water Regulation*. In addition, the Comptroller's order stated: "I concur with the decision from the South Coast Regional Office to transfer the water licences for these projects to [Harrison] based on the land tenures as recorded".

The Appellants appealed the order to the Board. The Appellants submitted that the Comptroller erred by interpreting the words "owner" and "licensee" in the *Water Act* based on the definition of "owner" under the *Land Title Act*, and by determining the water rental rates in a manner that was inconsistent with the *Water Regulation*.

In deciding the appeals, the Board considered four issues:

1. Was the Comptroller's concurrence with the regional office's "transfer" of the water licences to Harrison an appealable "order", and if so, was the order appealed within the 30-day appeal period required by the *Water Act*?
2. If so, based on the relevant provisions in the *Water Act* and the facts in this case, should the water licences for the five hydroelectric projects be in the name of Harrison?
3. Was the Comptroller's conclusion regarding water rental billing an appealable "order", and if so, was the order appealed within the 30-day appeal period required by the *Water Act*?
4. If so, did the Comptroller properly apply the *Water Act* and the *Water Regulation* to determine the rental rates for the projects?

On the first issue, the Board found that the Comptroller's concurrence with the regional office's "transfer" of the licences to Harrison was not an appealable "order" under the *Water Act*. The Comptroller's statement in the order "… that waterpower rental being billed to [Harrison] as a single licensee for the five hydropower projects in question is in accordance with the [legislation]" simply indicated that he concurred with the regional office's correction of the Ministry's records to reflect the operation of section 16(1) of the *Water Act*. Section 16(1) states that a water licence that is appurtenant to land will "pass with a conveyance or other disposition of the land…." The Board found that section 16(1) implies that the Ministry simply records a change of licensee in the Ministry's records upon receipt of written notification from the licensee, which the licensee is obligated to provide under section 16(2) of the *Water Act*. No order or action by a Ministry decision-maker is required for a licence to "pass with a conveyance or other disposition of the land…." The Board held that, in the present case, the inconsistency between the licensee as recorded in the Ministry's records (i.e., the respective Limited Partnership) and the holder of the lease over the appurtenant Crown land (i.e., Harrison) stemmed from the licensee's failure to provide notice, as required by section 16(2), of a conveyance or disposition of the appurtenant land. A conveyance or disposition of the appurtenant lands, from the Limited Partnerships to Harrison, occurred when the Crown land leases were issued in replacement for the licences of occupation.

Specifically, the Board applied the definition of "disposition" in the *Land Act* for the purpose of interpreting and applying section 16 of the *Water Act*, given that the appurtenant lands in this case are Crown lands subject to the *Land Act*. Applying that definition to the facts, the Board held that there was a conveyance or disposition of the appurtenant lands as contemplated in section 16 of

the *Water Act* when the licences of occupation held by the Limited Partnerships were replaced by Crown land leases registered in the name of Harrison. Given these findings, the Board did not need to address the second issue, but the Board addressed it for greater certainty.

On the second issue, the Board considered whether the Limited Partnerships fell within the definition of "owner" in the *Water Act*, such that they met the definition of "licensee" in the *Water Act* and could, therefore, hold a water licence. The *Water Act* defines an "owner" as "a person entitled to possession of any land … in British Columbia, and includes a person who has a substantial interest in the land…." The Board found that a limited partnership may acquire a water licence if, on the facts, it can qualify as a licensee under the *Water Act* by being an owner entitled to possession of the appurtenant land. Turning to the facts, the Board considered the language in the Limited Partnership Agreements, and concluded that Harrison was the "owner" of the appurtenant land for the purposes of the *Water Act*, and was the proper licensee of the water licences.

On the third issue, the Board found that, in the order, the Comptroller had determined the water rentals to be paid by the licensee, pursuant to sections 100(3) and 100(4.2) of the *Water Act* together with section 16(2) of the *Water Regulation*. The Board also found that his determination of water rentals constituted an "order" under the *Water Act* that was appealable to the Board, and the appeals were filed within the 30-day appeal period specified in the *Water Act*. Therefore, the Board had jurisdiction to hear the appeals in regard to the determination of rentals.

On the fourth issue, the Board found that section 16(4)(c) of the *Regulation* requires that water rental rates be based on the total output from all projects that are owned or operated by a single licensee. Having already found that Harrison is the proper licensee of the five water licences, the Board concluded that the power produced at the plants located on the appurtenant lands should be aggregated when calculating water rentals. For these reasons, the Board concluded that the Comptroller properly applied section 16(4)(c) of the *Water Regulation* in determining the water rentals for the five licences. Accordingly, the appeals were dismissed.

Subdivision of ranch leads to appeal over water rights

2014-WAT-022(a) & 2014-WAT-023(a) Bridge Creek Estate Ltd. v. Assistant Regional Water Manager (Emcee Holdings (1995) Ltd. and 100 Mile Ranch Ltd., Third Parties)

Decision Date: March 8, 2016

Panel: David H. Searle, C.M., Q.C.

Bridge Creek Estate Ltd. appealed two decisions of the Assistant Regional Water Manager (the "Water Manager"), Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"). The appealed decisions involved the apportionment of water rights between the Appellant and Emcee Holdings (1995) Ltd. ("Emcee"). As part of the apportionment decisions, the Water Manager issued four new water licences in substitution for two existing licences (the "original licences").

The original licences were issued in 1986 to Bridge Creek Estate, Ltd. (the "Original Ranch"), which operated a ranch on nearly 10,000 acres of land near 100 Mile House, BC. One of the original licences authorized water storage from October 1 to June 15 in a reservoir behind a dam, and the other authorized water diversion from three points downstream of the reservoir from April 1 to September 30 for irrigation purposes.

In 1995, the assets of the Original Ranch were divided between Emcee and the Appellant. The lands of the Original Ranch were subdivided, with the Appellant receiving approximately 7,700 acres including the land where the reservoir and one

point of diversion is located, and Emcee receiving approximately 2,700 acres including the land where two points of diversion are located. The Ministry was not notified of the subdivision.

Emcee's ranch mainly produces high quality hay, and it also boards some cattle. The Appellant's ranch focuses on cattle grazing, but it also produces some hay. Both operations rely on irrigation to produce more than one hay crop. Until 2014, both operations had sufficient water. The Appellant relied on water under the original licences to irrigate its lands, whereas Emcee relied on treated effluent from the regional district to irrigate its lands and did not use water under the original licences. The Appellant also managed the storage and use of water in the reservoir to create meadows, which were left after the stored water receded, for grazing cattle and growing hay.

Once the Ministry became aware of the subdivision of the Original Ranch lands, it notified the Appellant and Emcee that it proposed to apportion 71% of the water rights under the original licences to the Appellant and 29% to Emcee, based on each party's share of the irrigable land. In response, the Appellant wrote to the Ministry in 2006 and 2012, objecting to the proposed apportionment.

In 2014, the Water Manager decided to apportion the water rights 71/29 based on his consideration of the facts, the Appellant's objections, and the Ministry's policies on apportionment. The Water Manager issued the four new licences in substitution for the two original licences. Two new licences (one for storage and one for irrigation) were issued to each of the Appellant and Emcee, with a 71/29 water allocation. The terms and conditions in the new licences regarding the water source, the periods of water storage and irrigation, and the points of diversion were unchanged from the original licences. In addition, the Water Manager urged the parties to develop a joint works agreement for the dam and associated water works.

The Appellant appealed the Water Manager's decisions on the basis that the Appellant acquired the original licences when the Original Ranch lands were subdivided, the Appellant had sole use and control of the licensed water for 20 years, and the Water Manager's decisions were based on erroneous information. The Appellant also argued that having to store water until September 30 for Emcee's use adversely affected the viability of the Appellant's ranch, because the Appellant no longer had the use of the meadows that had formed when the Appellant solely controlled the storage and use of water.

Emcee was also unsatisfied with the situation. In 2015, the regional district ceased supplying treated effluent to Emcee. Consequently, Emcee irrigated its hay with water under its new water licences. However, the Appellant did not allow Emcee access to the dam, and Emcee had to go through a process of requesting that the Appellant release water from the reservoir every time it wanted to irrigate. Also, Emcee asserted that the amount of water reaching its points of diversion was less than the licensed amount. Emcee had proposed a joint works agreement, but the Appellant refused to sign it pending the outcome of the appeals.

The Board found that, although the Water Manager based his decision, in part, on erroneous information regarding each party's share of the irrigable land, the error was actually to the Appellant's benefit. New evidence presented to the Board indicated that Emcee had a much greater share, and the Appellant had a much lower share, of the irrigable land. Given the implications to the Appellant and Emcee of a significant change in the 71/29 apportionment, the Panel decided to refer that matter back to the Water Manager for further investigation, to determine whether the licences should be corrected to reflect each party's actual share of the irrigable land. In addition, the Board directed the Water Manager to

order joint use of the dam and associated water works, if the parties were unable to negotiate an agreement by April 31, 2016.

Accordingly, the appeals were dismissed.

Wildlife Act

Unused trapline should be allocated through an auction or tender process

2014-WIL-027(a) Tristan A. Galbraith v. Deputy Regional Manager

Decision Date: June 3, 2015

Panel: Reid White

Tristan Galbraith appealed the decision of the Deputy Regional Manager (the "Regional Manager"), Recreational Fisheries and Wildlife Program, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), denying Mr. Galbraith's application to become the registered holder of a trapline in the area between Whistler and Squamish, BC. Part of the area covered by the trapline is known as the Rubble Creek Landslide Hazard Area and has a high risk of landslides. That area was designated as a civil defence zone by an order-in-council (i.e., provincial Cabinet order) in 1980. According to the order-in-council, a number of activities are prohibited in the designated area. For example, without the consent of the Minister of Environment and the Minister of Municipal Affairs, no person may undertake any construction of a building or structure, construct campsites or other recreational facilities, or undertake any form of timber harvesting or other commercial activities, and no government authority may issue permits or licences relating to building or development.

In March 2014, Mr. Galbraith applied to be registered on the trapline.

In August 2014, the Regional Manager denied Mr. Galbraith's application. In his decision, the Regional Manager advised that according to the *Commercial Activities Regulation*, registration of a trapline can only be granted through a public auction or sealed tender process to qualifying individuals under section 42 of the *Wildlife Act*, or by the transfer of a registered trapline to a qualified person. The Regional Manager concluded that none of those circumstances applied in Mr. Galbraith's case, and therefore, his application was denied.

Mr. Galbraith appealed the Regional Manager's decision to the Board on the basis that his application pre-dated a trapline auction, which commenced in late April 2014. He also argued that the trapline had been unused for 13 years, and therefore, no transfer from an existing trapline owner was necessary.

In his submissions to the Board, the Regional Manager explained that the trapline was originally going to be included in the auction that was conducted in Spring 2014, but the Regional Manager removed the trapline from the auction when he realized that the trapline included part of the civil defence zone and had a high landslide hazard. The Regional Manager submitted that he intended to assess reconfiguration options for the trapline.

The Board found that, although the trapline overlaps with the civil defence zone, it is not the type of commercial activity that is prohibited under the order-in-council. Further, the Ministry's published guidelines for hunting and trapping state that the area is a high risk area, and that persons who hunt and trap in the area do so at their own risk, but it does not state that trapping is prohibited in the area. As such, the Board found that there was no legal prohibition against registering the trapline to a qualified person.

However, the Board also found that an auction or tender process under the *Commercial Activities Regulation* is appropriate for finding suitable candidates for registration of the trapline, given that it has been unused for 13 years and there is no current owner from which it may be transferred under the *Commercial Activities Regulation*. Given that the trapline had not been part of an auction process, and could not be transferred from an existing owner, the Board concluded that the Regional Manager properly denied Mr. Galbraith's application. The Board noted that Mr. Galbraith could participate in an auction or tender process for the trapline in the future, if such a process occurs.

Consequently, the Board confirmed the Regional Manager's decision, and dismissed the appeal.

Board dismisses appeal seeking a permit to shoot problem wildlife at night

2014-WIL-028(a) Brent D. Smith v. Deputy Regional Manager

Decision Date: August 14, 2015

Panel: Ken Long

Brent Smith appealed the decision of the Deputy Regional Manager (the "Regional Manager"), Recreational Fisheries and Wildlife Program, Thompson/Okanagan Region, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), denying Mr. Smith's application for a permit authorizing him to shoot a firearm or bow during prohibited hours with the use or aid of a light. The prohibited hours for hunting are one hour after sunset until one hour before sunrise.

In 2014, Mr. Smith applied for a permit to carry out a number of activities that are prohibited under the *Wildlife Act*. He sought the permit in order to provide the services of killing or capturing wildlife that create problems for farmers and ranchers in the southern interior of BC.

The Regional Manager issued a permit that authorized most of the activities that Mr. Smith had requested. However, he denied Mr. Smith's request for authorization to shoot during prohibited hours with the use or aid of a light. In his decision, the Regional Manager explained that he had significant concerns regarding public safety in populated areas, if he authorized that activity. He also noted that the Conservation Officer Service ("COS") did not support authorizing that activity.

Mr. Smith appealed the Regional Manager's decision to the Board on the basis that it was unreasonable, and that given his experience with firearms and as a former Conservation Officer, he could safely conduct night shooting. He also submitted that the COS focuses on human safety concerns related to problem wildlife, rather than the predation of livestock by coyotes and wolves, which leaves livestock producers without COS assistance in dealing with problem wildlife.

The Board noted that it is an offence under sections 26(1)(d) and (e) of the *Wildlife Act*, respectively, to hunt with a firearm or bow during prohibited hours, and to hunt with the use or aid of a light. The Board found that the discretion to issue a permit authorizing that activity must be exercised carefully, given that the activity is otherwise an offence. The Board found that the safety concerns identified by the COS and the Regional Manager were compelling. Furthermore, Mr. Smith provided no evidence to support his submission that thermal imaging (night vision) technology allows positive identification of the shooting target, and alleviates safety concerns related to the difficulty in observing the target and its surroundings at night. Consequently, the Board confirmed the Regional Manager's decision.

Accordingly, the appeal was dismissed.

No evidence to justify increasing guide outfitter's wildlife quotas

2014-WIL-011(a) Ryan Damstrom v. Regional Manager (BC Wildlife Federation, Coastal British Columbia Guide Outfitters Association, Participants)

Decision Date: November 3, 2015

Panel: Gregory J. Tucker

Ryan Damstrom appealed a decision of the Regional Manager, Kootenay/Boundary Region (the "Regional Manager"), Recreational Fisheries and Wildlife Program, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), setting Mr. Damstrom's game species quotas for the 2014-2015 licence year, and his associated five-year allocations. Mr. Damstrom received quotas and allocations for bull moose, bighorn sheep, mountain goat, and grizzly bear. Mr. Damstrom is a licensed guide outfitter.

Each year, regional managers in the Ministry determine annual quotas and multi-year allocations for guide outfitters in their region, which set out the number of a specific wildlife species that a guide outfitter's clients may kill in the guide's guiding area during the relevant time period. Regional managers exercise discretion in setting quotas and allocations, within a sustainable use framework that is established in Ministry policies and guidelines. Overall, wildlife harvest opportunities are managed based on four priorities, in order of priority: conservation; First Nations' needs; resident hunters' interests; and, non-resident hunters' interests. The Ministry's policies and guidelines also address the division of the annual harvest of game species between hunters who are residents of BC and hunters who are non-residents of BC. Guide outfitters' clients are usually non-resident hunters. As of 2007, Ministry policy is generally that, after accounting for conservation and First Nations' needs, 75% of the allowable harvest of a species will be allocated to resident hunters, and 25% will be allocated to non-resident hunters, subject to variation by the Director of Fish and Wildlife in certain circumstances. When that policy was implemented, it resulted in reductions in some quotas and allocations for some guide outfitters.

The issues raised in this appeal were closely connected to those raised in a previous appeal filed by Mr. Damstrom in 2013. In that case, Mr. Damstrom appealed his quotas for the 2013-2014 licence year, and his allocations for 2012-2016. On November 7, 2014, the Board confirmed Mr. Damstrom's 2013-2014 quotas and 2012-2016 allocations, except regarding mountain sheep (Decision No. 2013-WIL-028(a)).

Subsequently, Mr. Damstrom appealed his 2014-2015 quotas and 2012-2016 allocations. The Board offered both Mr. Damstrom and the Regional Manager an opportunity to provide written submissions and evidence. Mr. Damstrom relied on his Notice of Appeal, and the evidence and submissions tendered in his previous appeal. He provided no new evidence or submissions. The Regional Manager provided evidence regarding how he determined Mr. Damstrom's 2014-2015 quotas and 2012-2016 allocations.

The Board reviewed each of Mr. Damstrom's grounds for appeal, all of which were addressed in the Board's decision on his previous appeal. The Board found that Mr. Damstrom provided no new evidence or information that would provide a basis for reaching any conclusions that were different from the Board's conclusions in the previous appeal. The Board also reviewed the evidence and materials provided by the Regional Manager, and the Board found that the Regional Manager had properly applied the Ministry's policies when he determined Mr. Damstrom's 2014-2015 quotas and 2012-2016 allocations. Consequently, the Board confirmed the Regional Manager's decision.

Accordingly, the appeal was dismissed.

First Nation has authority to permit guiding on Reserve lands

2015-WIL-005(a) James Darin Wiens v. Regional Manager (Aaron Stelkia, Third Party)

Decision Date: March 2, 2016

Panel: Norman Yates

James Darin Wiens appealed a decision of the Regional Manager, Recreational Fisheries and Wildlife Programs, Thompson/Okanagan Region, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), to issue a guide outfitter licence to Aaron Stelkia for an area of land that, according to Mr. Wiens, fell within his guiding territory, in which he had exclusive rights to act as a guide outfitter. Mr. Wiens argued that Mr. Stelkia should not have been licensed to operate as a guide outfitter in part of his guiding territory without Mr. Wiens' consent, in accordance with section 51(3) of the *Wildlife Act*.

The area in question included part of the Osoyoos/Inkaneep Indian Reserve (the "Reserve"). Mr. Stelkia had held a guide outfitter's licence covering the Reserve since the late 1980s. Mr. Wiens, and his father before him, had held a guide outfitter's licence covering the area specified in his guiding territory certificate for at least three decades. However, the issue of a possible overlap in their territories had not arisen before.

The Board considered whether the Reserve was within Mr. Wiens' guiding territory, such that his consent was required before the Regional Manager could issue a guide outfitter's licence authorizing Mr. Stelkia to guide within the Reserve lands, pursuant to section 51(3) of the *Wildlife Act*.

Based on document evidence, the Board found that the original decision to allow guided hunting on the Reserve through a guide outfitter licence was made in or about 1987, by an agreement between the Osoyoos Indian Band and the Ministry. In August 1987, the Osoyoos Indian Band Council enacted a by-law which contemplates the issuance by the Band Council of a sheep hunting permit within the Reserve. Mr. Stelkia held a sheep hunting permit issued by the Osoyoos Indian Band Council, whereas Mr. Wiens provided no evidence that he held such a permit.

In addition, the Board noted that Mr. Wiens' guiding territory certificate stated that his territory included a specified area "... except, and unless permission is granted, private land, Provincial and Federal parks and *Indian Reserves*" [italics added]. Given that there was no evidence that Mr. Wiens held permission from the Osoyoos Indian Band Council to conduct guided hunts on the Reserve, whereas Mr. Stelkia did hold such permission, the Board concluded that Mr. Wiens' guiding territory did not include the Reserve. Consequently, section 51(3) of the *Wildlife Act* did not apply, and the Regional Manager was not required to obtain Mr. Wiens' consent before issuing a guide outfitter licence for the Reserve lands to Mr. Stelkia.

Accordingly, the appeal was dismissed.

Costs Decisions

Environmental Management Act

The Board has the power to order a party to pay all or part of the costs of another party in connection with an appeal. The Board's policy is to only award costs in special circumstances. In addition, if the Board considers that the conduct of a party has been frivolous, vexatious or abusive, it may order that party to pay all or part of the expenses of the Board in connection with the appeal.

Board declines to order a party to pay the Board's costs

2010-EMA-005(d) and 2010-EMA-006(d) Seaspan ULC (formerly Seaspan International Ltd.) v. Director, *Environmental Management Act* (Attorney General of British Columbia, Participant; Vancouver Fraser Port Authority, Fibreco Export Inc. and 602534 BC Ltd., Domtar Inc., Third Parties)

Decision Date: April 1, 2015

Panel: Robert Wickett, Blair Lockhart

In September 2014, the Board granted three applications for costs filed by the Vancouver Fraser Port Authority, Fibreco Export Inc. and 602534 BC Ltd., and the Director, *Environmental Management Act* (the "Director"), against Seaspan ULC ("Seaspan"). Those costs applications related to appeals of two decisions issued by the Director in relation to a contaminated site. In awarding costs to the applicants, the Board found that Seaspan had advanced a theory regarding the source of the contamination that it knew lacked merit, or it had not carefully assessed the strength (or lack thereof) of its theory. The Board also found that Seaspan was reluctant to clearly identify its position from the outset of the appeal process, that its position changed over the years, and its expert's report was deceptive and fundamentally and irredeemably flawed, such that Seaspan's theory crumbled when the expert witness was cross-examined. Seaspan then abandoned most of the grounds for its appeals. The Board concluded that Seaspan's case was more than doubtful; it was hopeless, and the theory advanced by Seaspan at the hearing should never have been pursued. For those reasons, the Board ordered Seaspan to pay the applicants' appeal costs pursuant to section 95(2)(a) of the *Environmental Management Act* (Decision Nos. 2010-EMA-005(c) and 2010-EMA-006(c)).

Given those findings, the Board requested submissions on whether Seaspan should be ordered to pay the Board's expenses in connection with the appeals pursuant to section 95(2)(b) of the *Environmental Management Act*. Section 95(2)(b) provides that the Board may order a party to pay all or part of the Board's expenses in connection with an appeal if the Board considers that the party's conduct has been "vexatious, frivolous or abusive".

The Board found that the purpose of section 95(2)(b) is to punish a party for vexatious, frivolous or abusive behaviour in the appeal process, rather than to compensate the Board. A high threshold of unwanted behaviour must be met before such an order will be made. Although Seaspan's conduct could be considered frivolous or vexatious in terms of the theory it advanced regarding the alleged source of contamination, its appeals also involved a constitutional question which was not improperly advanced. Further, the Board found that Seaspan had already been punished for its conduct by being ordered to pay the applicants' appeal costs. The Board concluded that these circumstances did not warrant ordering Seaspan to pay the Board's costs.

Summaries of Court Decisions Related to the Board

During this reporting period, the BC Supreme Court issued one decision on judicial reviews of Board decisions.

Monitoring plan is part of a two-stage decision-making process under the *Environmental Management Act*

Unifor Local 2301 v. Environmental Appeal Board, Attorney General of British Columbia, Rio Tinto Alcan Inc., Emily Toews and Elisabeth Stannus

Decision Date: September 4, 2015

Court: B.C.S.C., Ehrcke J.

Citation: 2015 BCSC 1592

Unifor Local 2301 ("Unifor") sought a judicial review of a decision issued by the Environmental Appeal Board (the "Board"). The Board's decision concerned whether the approval of an environmental effects monitoring plan (the "Plan") by the Director, *Environmental Management Act* (the "Director"), Ministry of Environment, was an appealable "decision" as defined under section 99 of the *Environmental Management Act* (the "*Act*"). The Plan applied to emissions from an aluminum smelter operated by Rio Tinto Alcan Inc. ("Rio Tinto") in Kitimat, BC. Unifor is a union that represents the smelter's workers and retired workers, many of whom live in the Kitimat area.

Rio Tinto was required to prepare the Plan, and implement it once approved, under a condition in a permit amendment that the Director had issued in 2013. That amendment applied to Rio Tinto's permit authorizing emissions from the smelter. In addition to requiring the Plan, the amendment also increased the maximum daily limit on sulphur dioxide emissions from the smelter. The amendment was already the subject of appeals filed by two Kitimat residents, Elisabeth Stannus and Emily Toews. Those appeals had not yet been heard by the Board. Unifor did not appeal the amendment.

In November 2014, Ms. Stannus, Ms. Toews, and Unifor filed separate appeals against the approval of the Plan. Before accepting those appeals, the Board requested submissions from the parties regarding whether the approval of the Plan was an appealable "decision" as defined by section 99 of the *Act*, and whether the Appellants were "persons aggrieved" by the Plan under section 100(1) of the *Act*.

In December 2014, the Board found that the Director's approval of the Plan was not an appealable "decision" as defined by section 99 of the *Act* (Emily Toews, Elisabeth Stannus, and Unifor Local 2301 v. Director, *Environmental Management Act* (Decision No. 2014-EMA-003(a), 004(a), 005(a), December 4, 2014)). Applying the principles of statutory interpretation, the Board found that the approval of the Plan did not fall within the ambit of any of the

appealable matters listed in section 99. The Board also found that policy considerations supported a finding that the approval of the Plan was not appealable. Specifically, the Board found that concerns about the adequacy of the Plan had already been raised in the appeals against the amendment. The Board also noted that the Plan did not change the amount or type of emissions allowed under Rio Tinto's permit, and that allowing an appeal of every monitoring plan or further study required by a permit or permit amendment would allow parties to circumvent the 30-day period for appealing a permit or permit amendment.

Given the Board's finding that the approval of the Plan was not appealable, it was unnecessary to decide whether the Appellants were "persons aggrieved" by the Plan. The appeals were rejected.

Unifor sought a judicial review of the Board's decision by the BC Supreme Court. Unifor argued that the Board: (1) took an unjustifiable approach to the "staged" decision-making process that was used by the Director; (2), took an overly technical approach to the meaning of "decision" in section 99 of the *Act*; and (3), relied on an irrelevant consideration, namely, that appeals of the amendment had already been filed by Ms. Toews and Ms. Stannus.

First, the Court addressed the standard of review that applied to the Board's decision. The Court found that the judicial review was concerned with the Board's interpretation of the *Act*, which is its "home statute", and therefore, according to recent decisions form the Supreme Court of Canada, the Court should presume that the appropriate standard of review is "reasonableness". This meant that the question was whether the Board's interpretation of the definition of "decision" in section 99 of the *Act* fell outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The Court found that the Board's interpretation of the definition of "decision" in section 99 of the *Act* was unreasonable. The Court held that the approval of the Plan ought to have been considered part of a two-stage decision-making process involving Rio Tinto's permit amendment application. The Court concluded that the approval of the Plan was part of the Director's amendment decision, and therefore, the approval of the Plan was appealable as a "decision" under one of the subsections of section 99 of the *Act*. The Court did not specify which subsection within section 99 applied. The Court also found that it is unreasonable to require someone to commence an appeal of a decision before the full content of that decision is known, which, in this case, was when the contents of the approved Plan were known. Finally, the Court held that the existence of appeals against the amendment was irrelevant to the question of whether the Board had jurisdiction to hear Unifor's appeal against the Plan.

Accordingly, the Court set aside the Board's decision as it pertained to Unifor, and remitted the matter back to the Board for reconsideration in accordance with the Court's reasons.

Summaries of Cabinet Decisions Related to the Board

There were no orders by Cabinet during this reporting period concerning decisions by the Board.

APPENDIX I

Legislation and Regulations

Reproduced below are the sections of the *Environmental Management Act* and the *Environmental Appeal Board Procedure Regulation* which establish the Board and set out some of its general powers and procedures. As specified in section 93.1 of the *Environmental Management Act*, many of the Board's powers are also provided in the *Administrative Tribunals Act*. A link to the *Administrative Tribunals Act* and its regulations can be found on the Board's website (www.eab.gov.bc.ca).

Also included are the appeal provisions contained in each of the statutes which provide for an appeal to the Board: the *Environmental Management Act*, the *Greenhouse Gas Industrial Reporting and Control Act*, the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, the *Integrated Pest Management Act*, the *Water Sustainability Act*, and the *Wildlife Act*. Some appeal provisions are also found in the regulations made under the *Greenhouse Gas Industrial Reporting and Control Act* and the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*. The appeal provisions in the *Water Sustainability Act* apply to appeals under the *Water Users' Communities Act*.

The legislation contained in this report is the legislation in effect at the end of the reporting period (March 31, 2016). Please note that legislation can change at any time. An updated version of the legislation may be obtained from Crown Publications.

Although not provided below, it should be noted that, in addition to decisions of government officials, Part 3 of the *Environmental Management Act* gives district directors and officers appointed by the Greater Vancouver Regional District certain decision-making powers that can then be appealed to the Board under the appeal provisions in the *Environmental Management Act* referenced below. In addition, the *Oil and Gas Activities Act*, S.B.C. 2008, c. 36 (not reproduced) allows the Oil and Gas Commission to make certain decisions under the *Water Sustainability Act* and the *Environmental Management Act*, and those decisions may be appealed in the usual way under the appeal provisions of the *Water Sustainability Act* and *Environmental Management Act*, as set out below.

Environmental Management Act, (SBC 2003, c. 53)

Part 8 – Appeals

Division 1 – Environmental Appeal Board

Environmental Appeal Board

93 (1) The Environmental Appeal Board is continued to hear appeals that under the provisions of any enactment are to be heard by the appeal board.

(2) In relation to an appeal under another enactment, the appeal board has the powers given to it by that other enactment.

(3) The appeal board consists of the following individuals appointed by the Lieutenant Governor in Council after a merit based process:

(a) a member designated as the chair;

(b) one or more members designated as vice chairs after consultation with the chair;

(c) other members appointed after consultation with the chair.

(4) [Repealed 2015-10-60.]

(5 and 6) [Repealed 2003-47-24.]

(7) to (11) [Repealed 2015-10-60.]

Application of *Administrative Tribunals Act*

93.1 (1) Subject to subsection (2), for the purposes of an appeal, the following provisions of the *Administrative Tribunals Act* apply to the appeal board:

(a) Part 1 [*Interpretation and Application*];

(b) Part 2 [*Appointments*];

(c) Part 3 [*Clustering*];

(d) Part 4 [*Practice and Procedure*], except the following:

(i) section 23 [*notice of appeal (exclusive of prescribed fee)*];

(ii) section 24 [*time limit for appeals*];

(iii) section 33 [*interveners*];

(iv) section 34 (1) and (2) [*party power to compel witnesses and require disclosure*];

(e) Part 6 [*Costs and Sanctions*];

(f) Part 7 [*Decisions*];

(g) Part 8 [*Immunities*];

(h) section 57 [*time limit for judicial review*];

(i) section 59.1 [*surveys*];

(j) section 59.2 [*reporting*];

(k) section 60 [*power to make regulations*].

(2) A reference to an intervener in a provision of the *Administrative Tribunals Act* made applicable to the appeal board under subsection (1) must be read as a reference to a person or body to which both of the following apply:

(a) the appeal board has given the person or body the right to appear before it;

(b) the person or body does not have full party status.

Parties and witnesses

94 (1) In an appeal, the appeal board or panel

(a) may hear the evidence of any person, including a person the appeal board or a panel invites to appear before it, and

(b) on request of

(i) the person,

(ii) a member of the body, or

(iii) a representative of the person or body, whose decision is the subject of the appeal or review, must give that person or body full party status.

(2) and (3) [Repealed 2015-10-62.]

Repealed

95 [Repealed 2015-10-62.]

Decision of appeal board

96 If the appeal board or a panel makes an order or decision with respect to an appeal the chair must send a copy of the order or decision to the minister and to the parties.

Varying and rescinding orders of appeal board

97 The Lieutenant Governor in Council may, in the public interest, vary or rescind an order or decision of the appeal board.

Appeal board power to enter property

98 The members of the appeal board have, for the purposes of an appeal, the right to enter any property except a private residence.

Division 2 – Appeals from Decisions under this Act

Definition of "decision"

99 For the purpose of this Division, "decision" means

(a) making an order,

(b) imposing a requirement,

(c) exercising a power except a power of delegation,

(d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,

(e) including a requirement or a condition in an order, permit, approval or operational certificate,

(f) determining to impose an administrative penalty, and

(g) determining that the terms and conditions of an agreement under section 115 (4) [*administrative penalties*] have not been performed.

Appeals to Environmental Appeal Board

100 (1) A person aggrieved by a decision of a director or a district director may appeal the decision to the appeal board in accordance with this Division.

(2) For certainty, a decision under this Act of the Lieutenant Governor in Council or the minister is not appealable to the appeal board.

Time limit for commencing appeal

101 The time limit for commencing an appeal of a decision is 30 days after notice of the decision is given.

Procedure on appeals

102 (1) Division 1 [*Environmental Appeal Board*] of this Part applies to an appeal under this Division.

(2) The appeal board may conduct an appeal under this Division by way of a new hearing.

Powers of appeal board in deciding appeal

103 On an appeal under this Division, the appeal board may

(a) send the matter back to the person who made the decision, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

Appeal does not operate as stay

104 [Repealed 2015-10-64.]

Division 3

105 [Repealed 2015-10-64.]

Environmental Appeal Board Procedure Regulation,

(BC Reg. 240/2015)

Interpretation

1 In this regulation:

"Act" means the *Environmental Management Act*;

"appealed decision" means an action, decision or order that is the subject of an appeal to the board;

"board" means the Environmental Appeal Board established under the Act;

"notice of appeal" means a notice a person is required, under an enactment or rule, to give in order to begin an appeal to the board.

Notice of Appeal

2 (1) A notice of appeal must be accompanied by a fee, in the amount of $25 for each appealed decision, payable to the minister responsible for the administration of the *Financial Administration Act*.

(2) The board must deliver a notice of appeal to

(a) the minister responsible for the administration of the Act,

(b) the minister responsible for the administration of the enactment under which the appeal arises, and

(c) the official who made the appealed decision.

(3) For certainty, nothing in this section affects the power of the board to make rules requiring that a notice of appeal be delivered to persons in addition to those enumerated in subsection (2).

Providing reasons for orders or decisions

3 The board must provide an order or decision, other than an unwritten order or decision made in the course of a hearing, and any reasons for the order or decision to

(a) the parties, and

(b) the minister responsible for the administration of the enactment under which the appeal arises.

Transcripts

4 (1) A person may request a transcript of any proceedings before the board or a panel.

(2) A person who makes a request under subsection (1) must pay the cost of preparing the transcript.

Greenhouse Gas Industrial Control and Reporting Act, (SBC 2014, c. 29)

Part 5 – Appeals to Environmental Appeal Board

What decisions may be appealed, who may appeal and the appeal process

40 (1) For the purposes of this Part, **"decision"** means any of the following:

(a) a determination of non-compliance under section 24 [*imposed administrative penalties: inaccurate report or failure to report*] or of the extent of that non-compliance, as set out in an administrative penalty notice;

(b) a determination of non-compliance under section 25 [*imposed administrative penalties in relation to other matters*], of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;

(c) a prescribed decision or a decision in a prescribed class.

(2) A person who is served with

(a) an administrative penalty notice referred to in subsection (1) (a) or (b), or

(b) a document evidencing a decision referred to in subsection (1) (c)

may appeal the applicable decision to the appeal board.

(3) Subject to this Act, Division 1 of Part 8 [*Appeals*] of the *Environmental Management Act* applies in relation to appeals under this Act.

Greenhouse Gas Emission Administrative Penalties and Appeal Regulation,

(BC Reg. 248/2015)

Part 2 – Appeals

Appeals to Environmental Appeal Board

12 (1) Decisions made under the following sections of the *Greenhouse Gas Emission Reporting Regulation* are prescribed for the purposes of section 40 (1) (c) [*what decisions may be appealed*] of the Act:

(a) section 16 (2) (a) or (3) (a) [*choice between direct measurement and mass balanced-based methodology*];

(b) section 26 (3) (b) [*verification bodies*].

(2) Decisions made under the following sections of the *Greenhouse Gas Emission Control Regulation* are prescribed for the purposes of section 40 (1) (c) of the Act:

(a) section 10 (1), (3) or (4) [*suspension or cancellation of accounts*];

(b) section 13 (4) (b) [*validation bodies and verification bodies*];

(c) section 17 (2) [*acceptance of project plan*];

(d) section 23 (2) [*issuance of offset units*].

(3) After making a decision referred to in subsection (1) or (2), the director must serve notice of the decision in accordance with section 41 [*notice and service under this Act*] of the Act.

(4) The following provisions of the *Environmental Management Act* apply in relation to appeals under the Act:

(a) section 101 [*time limit for commencing appeal*];

(b) section 102 (2) [*procedure on appeals*];

(c) section 103 [*powers of appeal board in deciding appeal*].

(5) For the purposes of subsection (4) (a) and (c), a reference to a decision in section 101 or 103 of the Environmental Management Act is to be read as a reference to a decision under section 40 (1) of the Act.

Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act,

(SBC 2008, c. 16)

Part 5 – Appeals to Environmental Appeal Board

What decisions may be appealed, who may appeal, the process of appeal

14 (1) For the purposes of this Part, **"decision"** means any of the following:

(a) the determination of non-compliance under section 11 [*imposed administrative penalties: fuel requirements*] or of the extent of that non-compliance, as set out in an administrative penalty notice;

(b) the determination of non-compliance under section 12 [*administrative penalties in relation to other matters*], of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;

(c) a refusal to accept an alternative calculation of carbon intensity under section 6(5) (d) (ii) (B) [*low carbon fuel requirement*];

(d) a prescribed decision or a decision in a prescribed class.

(2) A person who is served with

(a) an administrative penalty notice referred to in subsection (1) (a) or (b),

(b) a refusal referred to in subsection (1) (c), or

(c) a document evidencing a decision referred to in subsection (1) (d)

may appeal the applicable decision to the appeal board.

(3) Subject to this Act, Division 1 of Part 8 [*Appeals*] of the *Environmental Management Act* applies in relation to appeals under this Act.

Renewable and Low Carbon Fuel Requirements Regulation,

(B.C. Reg. 394/2008)

Part 4 – Appeals

Time limit for commencing appeal

21 The time limit for commencing an appeal is 30 days after the notice of administrative penalty to which it relates is served.

Procedures on appeal

22 An appeal must be

(a) commenced by notice of appeal in accordance with the *Environmental Appeal Board Procedure Regulation*, and

(b) conducted in accordance with Part 5 [*Appeals to Environmental Appeal Board*] of the Act and the *Environmental Appeal Board Procedure Regulation*.

Powers of appeal board on appeal

23 (1) On an appeal, the appeal board may

(a) send the matter back to the person who made the decision with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

(2) The appeal board may conduct an appeal by way of a new hearing.

Integrated Pest Management Act,

(SBC 2003, c. 58)

Part 4 – Appeals to the Environmental Appeal Board

14 (1) For the purposes of this section, **"decision"** means any of the following:

(a) making an order, other than an order under section 8 [*minister's orders*];

(b) specifying terms and conditions, except terms and conditions prescribed by the administrator, in a licence, certificate or permit;

(c) amending or refusing to issue, amend or renew a licence, certificate or permit;

(d) revoking or suspending a licence, certificate, permit or confirmation;

(e) restricting the eligibility of a holder of a licence, certificate, permit or pest management plan to apply for another licence, certificate or permit or to receive confirmation;

(f) determining to impose an administrative penalty;

(g) determining that the terms and conditions of an agreement under section 23(4) [*administrative penalties*] have not been performed.

(2) A declaration, suspension or restriction under section 2 [*Act may be limited in emergency*] is not subject to appeal under this section.

(3) A person may appeal a decision under this Act to the appeal board.

(4) The time limit for commencing an appeal of a decision is 30 days after the date the decision being appealed is made.

(5) [Repealed 2015-10-109.]

(6) Subject to this Act, Division 1 of Part 8 of the *Environmental Management Act* applies to an appeal under this Act.

(7) The appeal board may conduct an appeal by way of a new hearing.

(8) On an appeal, the appeal board may

(a) send the matter back to the person who made the decision being appealed, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

(9) [Repealed 2015-10-109.]

Water Sustainability Act,
(SBC 2014, c. 15)

Division 3 – Appeals

Appeals to appeal board

105 (1) Except as otherwise provided in this Act, an order resulting from an exercise of discretion of the comptroller, a water manager or an engineer may be appealed to the appeal board by any of the following:

(a) the person who is subject to the order;

(b) subject to subsection (2), an owner whose land is or is likely to be physically affected by the order;

(c) the owner of the works that are the subject of the order;

(d) the holder of an authorization, a riparian owner or an applicant for an authorization who considers that his or her rights are or will be prejudiced by the order.

(2) In the case of the issuance of a drilling authorization, a person whose consent has been given for the purposes of section 62 (4) (c) [*drilling authorizations*] has no right of appeal unless the order respecting the drilling authorization in respect of which the consent was given is inconsistent with that consent.

(3) The time limit for a person to commence an appeal is 30 days after the date on which notice of the order being appealed is delivered to the person.

(4) Subject to this Act, Division 1 of Part 8 of the *Environmental Management Act* applies to an appeal under this Act.

(5) The appeal board may conduct an appeal by way of a new hearing.

(6) On an appeal, the appeal board may

(a) send the matter back, with directions, to the comptroller, water manager or engineer who made the order being appealed,

(b) confirm, reverse or vary the order being appealed, or

(c) make any order that the person whose order is being appealed could have made and that the board considers appropriate in the circumstances.

(7) [Repealed 2015-10-192.]

Water Users' Communities Act, (RSBC 1996, c. 483)

Application of *Water Sustainability Act*

100.1 (1) The following provisions of the *Water Sustainability Act* apply for the purposes of this Act:

...

(b) section 105 [*appeals to appeal board*];

Wildlife Act, (RSBC 1996, c. 488)

Reasons for and notice of decisions

101 (1) The regional manager or the director, as applicable, must give written reasons for a decision that affects

(a) a licence, permit, registration of a trapline or guiding territory certificate held by a person, or

b) an application by a person for anything referred to in paragraph (a).

(1.1) The regional manager must give written reasons for a decision made under section 61 (1.1) (a) or (b).

(2) Notice of a decision referred to in subsection (1) or (1.1) must be given to the affected person.

(3) Notice required by subsection (2) may be by registered mail sent to the last known address of the person, in which case, the notice is conclusively deemed to be served on the person to whom it is addressed on

(a) the 14th day after the notice was deposited with Canada Post, or

(b) the date on which the notice was actually received by the person, whether by mail or otherwise,

whichever is earlier.

(4) For the purposes of applying this section to a decision that affects a guiding territory certificate, if notice of a decision referred to in subsection (1) is given in accordance with this section to the agent identified in the guiding territory certificate, the notice is deemed to have been given to the holders of the guiding territory certificate as if the agent were an affected person.

Appeals to Environmental Appeal Board

101.1 (1) The affected person referred to in section 101 (2) may appeal the decision to the Environmental Appeal Board continued under the *Environmental Management Act*.

(2) The time limit for commencing an appeal is 30 days after notice is given

(a) to the affected person under section 101 (2), or

(b) in accordance with the regulations.

(3) Subject to this Act, Division 1 of Part 8 of the *Environmental Management Act* applies to an appeal under this Act.

(4) The appeal board may conduct an appeal by way of a new hearing.

(5) On an appeal, the appeal board may

(a) send the matter back to the regional manager or director, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

(6) [Repealed 2015-10-197.]

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